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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY,
Petitioner,

vs.

HILBERT STUART ALLEN,
Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

WALTER A. EVERSMAN,
JAMES C. JONES,
EDWARD C. CROW,
LON O. HOCKER,
FRANK H. SULLIVAN,
Counsel for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. Central 4477.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the Toledo, St. Louis & Western Railroad Company, a corporation, presents this, its petition for a writ of certiorari, to be addressed to the Supreme Court of the State of Missouri, and for cause therefor respectfully represents:

The petitioner is a railroad corporation owning and operating a railroad for the transportation of persons and

commodities, in part, in interstate commerce. Hitherto the railroad of the petitioner was in the possession of one Walter L. Ross, as Receiver thereof, under the orders and appointment of the District Court of the United States for the Western Division of the Northern District of Ohio, and such Receiver was for a time engaged in the operation of the petitioner's said railroad.

Hilbert Stuart Allen, while employed by the Receiver as a car checker in the railroad yards of the respondent at Madison, in the State of Illinois, suffered injuries.

He thereafter brought his action against the Receiver in the Circuit Court of the City of St. Louis, asserting that his injuries were due to the negligence of the Receiver and his employes in particulars presently to be noted, and while the respondent and the employes of the Receiver were engaged in operations connected with interstate commerce within the scope of the Federal Employers' Liability Statute.

Pending this action, the Court which had appointed the Receiver discharged him and restored the possession of its road to the petitioner upon condition that the petitioner assume obligations of the Receiver incurred in and with respect to his possession and operation of the property. Thereupon the respondent amended his petition aforesaid so as to name the petitioner as a party to his action, and presently the Receiver was dismissed therefrom, and the same proceeded thenceforward, between the respondent as plaintiff and the petitioner herein as the sole defendant,

to an inquiry into the alleged negligence of the Receiver and his employes in the particulars specified.

Upon a trial of the cause there was a verdict and judgment for the respondent (R. 3), and the petitioner appealed the cause to the Supreme Court of the State of Missouri (R. 4).

In that court, in due course, upon a hearing to a division of the Court, there was an affirmance of the judgment of the Circuit Court (R. 320) upon an opinion delivered by the division (R. 322-332).

A motion filed by the petitioner for a rehearing (R. 334-374) was denied on October 11, 1926 (R. 376); but the opinion of the Court was modified thereon (R. 377-391).

The petitioner presented an application for the transfer of the cause to the Supreme Court of Missouri en banc for hearing (R. 393-396), which was denied on December 21, 1926 (R. 411).

The facts developed at the trial were these:

The petitioner owns, and the Receiver was operating at the time of the accident to respondent, a railroad switching yard at Madison, in the State of Illinois, in which trains were regularly made up for movement over the railroad of the petitioner. A portion of this yard consisted of a lead track with various sidetracks running off from the same, parallel with each other, and connected with the lead by means of switch stands. A plat appearing in the record, at page 103, will serve to show the relative location of the switch tracks so far as necessary to the case.

Photographs following page 177 will serve to show the spacing between these tracks when occupied by cars, and the relation of the space remaining to the space occupied by a human body, and will also visualize the construction of the two cinder cars, the movement of which resulted in the hurts of which the respondent complained.

With these preliminary observations we take the facts developed at the trial from the statement thereof in the final opinion of the Supreme Court of the state indicating in notes following wherein we think there is departure from the facts as shown by the record:

> "The testimony for plaintiff is that he had been employed as a car checker for about eighteen months in the yards of the company at Madison, Illinois. There were a number of sidetracks connected with a lead track running east and west. Plaintiff's hours of labor were from 11 p. m. to 7 a. m. His duties were to check the cars in freight trains, note the numbers and initials of cars and numbers of seals on sealed cars and their destinations and write out a train sheet so the conductor of the train could recheck and get ready to leave on time. Plaintiff reported to the yardmaster, Flack, and went to work at 11 p. m. on October 26, 1922. He checked a train of about thirty-four cars on track 6, and while preparing the train sheet the train dispatcher sent in an order to let that train go out with only nineteen cars and pick up others at Edwardsville. While Murdock, the switch foreman, and plaintiff were in the office of the yardmaster, Flack ordered Murdock to make up a train on track 5 to leave at 2:30 a. m. for

points in Indiana and Ohio and directed plaintiff to check the cars.

"Plaintiff began at the west end of the train, between tracks 4 and 5 on the north side of the cars, facing the south, with his left arm through the bail of his lantern and the lantern on his shoulder. He was proceeding in the customary manner, standing about three feet back from a car he was checking, when, about 1:15 a. m., he was struck, run over, dragged and injured by a cinder car which was kicked or shunted west by the switching crew and engine on track 4, without any warning whatever. There was no man or light on the cinder car. Murdock, the foreman of the switching crew, knew that plaintiff was engaged in his duties between tracks 4 and 5; in fact, saw him at a distance of 100 or 125 yards (or one whom he assumed was the plaintiff), with his lantern, engaged in checking the train, when he (Murdock) cut loose two cinder cars from a string of cars being moved west on the lead track and shunted them onto track 4 where they moved west at a speed of four to six miles per hour and ran over the plaintiff. They made little, if any, noise, and were not heard or seen by plaintiff. Murdock's purpose was to make up a local freight train on track 4, due to leave at 7 a. m. Track 4 was clear when plaintiff began to check the train on track 5, and he believed the switching was all done, and was not informed there would be other switching in the yard before the departure of the train which he was checking. The clearance between the car plaintiff was checking and the cinder cars was about two feet nine inches, without considering the grab irons on the

cinder cars which projected four and one-fourth inches from each corner.

"The switch yard was not lighted and there was no moon on the night plaintiff was injured. When the engine was about to be moved it was customary to ring the bell if anyone was working near by. It was customary, when plaintiff was engaged in checking cars, for passing switchmen to tell him if cars were to be switched by the place where he was working; that when he knew cars were coming down on another track plaintiff would flatten himself up against the car he was checking and allow them to pass him; that he had only half the usual time in which to do his checking and get the train sheet to the conductor; that when Murdock, the switch foreman, was about to cut the cinder cars loose from a string of cars which the engine was pushing on the lead track he gave the usual high ball and stop signals with his lantern, which were relayed to the engineer (who was on the north side of the engine and could not see plaintiff); these signals were received by the engineer, the cars were cut loose and shunted west on track 4, but no signal of this movement was given by bell, whistle or otherwise; that Murdock, from his position, could have called to plaintiff, but he did not do so because he did not think plaintiff was in any danger from the cars; that Murdock heard plaintiff yelling and he and others ran to him and found that he had crawled over track 4 and was lying between tracks 3 and 4; an ambulance was called and plaintiff was taken to a hospital, where he remained eleven weeks and five days.

"Further testimony is that plaintiff's duties took him into all parts of the yard where he knew the

crew would be switching cars, but ordinarily trains would be made up before he would go out to check them; that they hardly ever made up another train on a track where he was checking a train. It is conceded that the company had no rules regulating the movement of the engine or cars in making up trains or shunting cars in the yard, or for giving signals to car checkers or other employes in the yards to warn them of such movements.

"Plaintiff did not see or hear the cinder cars moving toward him. He felt something strike him and he was at once thrown down, run over and dragged under the car. * * * The evidence for the defendant, including the testimony of one or two members of the switching crew who were plaintiff's witnesses, is that it is not usual or customary to give car checkers or other employes in the yard notice or warning by bell, whistle or otherwise, of the movements of the engine or cars in the yard, or of the shunting or kicking of cars on or along a track or sidetrack; that it is the custom for all such employes to look out for their own safety during such operations; nor is it customary to put a light or to station a man on the end of a car that is being so moved or shunted to warn employes in the yard. No member of the switching crew except Murdock, the foreman, saw plaintiff in the yard, or knew that he was engaged in checking the train on track 5 at the time the cinder cars were shunted onto track 4, or knew that such movement would be attended with risk or danger to him" (Rec., pp. 378, 379, 380).

Additional Observations Are These:

1. Some, at least, of the cars which the respondent was engaged in checking were to move in interstate commerce (R. 46, 153, 106-109).

2. The respondent, as a witness, described the night as just an ordinary night, except the moon was not shining (R. 107). Other witnesses named it as a clear, starlight night (R. 64, 152).

3. The effect of the testimony offered at the trial by the respondent as to warning from switchmen, when cars were to be shunted or switched in his vicinity, is overstated by the Commissioner of the state court who prepared the opinion of that tribunal. The plaintiff himself said *if the switchmen happened to pass by his vicinity* they would tell him they were presently intending to switch other cars onto the track on which he was working, or onto adjoining tracks, if such were the fact (R. 111). His son, who was a switchman, and who testified for the respondent, made the same statement, but added that, *if the switchmen were not brought near the checker in the course of their duties, he was not furnished with such information* (R. 135). There was no other testimony on that subject, and the undisputed facts show that on the night of the accident suffered by the respondent the switchmen were not in his vicinity after he began his duties (R. 157).

4. The respondent knew the switching crew were working in the yard (R. 122-123). His testimony shows no effort on his part to kep himself informed as to what they were doing (R. 104-126).

5. The alleged knowledge of Murdock, the foreman of the switching crew, as to the position of the respondent at the time the cars were shunted onto track 4 on the orders of Murdock is not supported by the record. The photographs make plain the fact that an employe engaged in switching cars has ample room between the tracks without subjecting himself to risk. Murdock was one hundred and twenty-five yards away from the respondent at the time the two cars were, upon his order, shunted onto the adjoining track to that at which the respondent was working at the time. The only witness with respect to what Murdock could or could not observe was Murdock himself. All he could see was a lantern, which he assumed to be carried by the respondent merely from his knowledge of respondent's duties. Murdock did not know and could not possibly have ascertained that the respondent had placed himself so near to track 4 as to be in danger from the movement of cars thereon. On this there is no conflict in the testimony (R. 67, 80, 81, 84, 86 and 94).

6. The clicking of the cars over the joints of the rails was audible one or two car lengths away (R. 152).

In the charge to the jury the trial court authorized the jury to convict the Receiver of negligence (a) if the space between the tracks was believed by the jury to be too re-

stricted; (b) if Murdock, in the act of causing the cars to be shunted onto the adjoining track, was aware that the respondent had placed himself in a position of peril and was oblivious thereto, *or if Murdock might have ascertained this situation by the exercise of ordinary care;* (c) if the jury regarded it as dangerous to shunt the cars onto the adjoining track without lights and with no one riding thereon; (d) if the movement was made without causing the bell to be rung on the engine (R. 292, 298).

Conversely, the trial court refused to withdraw from the jury the alleged negligence in failing to ring the bell or to have a man ride the shunted cars (R. 301): the alleged negligence with respect to the relative location of the tracks (R. 302); the charge that the employes of the Receiver might have seen the respondent in a position of peril in time to avoid the accident (R. 302).

That court also refused to charge the jury that if it was the custom in the yard not to give warning to car checkers of car movements, and the respondent knew the fact, he assumed the risks incident to that method of work (R. 303).

To all these rulings exceptions were taken by the petitioner (R. 298, 303) and were preserved in accordance with the local practice (R. 305) in the record taken before the Supreme Court of the state for review.

The final opinion of the Supreme Court of the state will be found at pages 377-391 of the printed record. And with respect thereto we submit the following

cognizable here.

I.

The judgment of affirmance, although not dealing with the question, necessarily affirmed the action of the lower court in authorizing the jury to convict the Receiver of negligence based upon the manner in which the engineers of the petitioner had located these tracks with respect to each other, whereas on correct principles, often declared and enforced by this Court, the respondent assumed whatever risk was involved in working under such conditions.

II.

The State Supreme Court affirmed the view of the court below that it was negligence on the part of the Receiver not to have someone ride these shunted cars with a light and so as to control their movements, ignoring the uncontradicted testimony that the custom of the yard was to do as was here done, and the respondent must needs have known the fact and assumed the risk under the principles often declared by this Court.

III.

The Supreme Court approved and applied to the case (R. 385) its own previously expressed view (Tetwiler v. Railroad, 242 Mo. 178) that it was negligence to move the

switch engine without ringing the bell, rather than the view of this Court (Randall v. Baltimore & Ohio Railroad Co., 109 U. S. 482; Aerkfetz v. Humphreys, 145 U. S. 418), that the ringing of the bell under such conditions as a warning to employes but leads to confusion, and fails, therefore, of its purpose, and is not required by proper rules of the law.

IV.

The Supreme Court of the State erred in classing the shunting of these cars without a man or light on them as an unusual hazard which the respondent did not assume, despite the entirely uncontradicted testimony that it was done all the time when occasion demanded, and to the full knowledge of the respondent, for the full eighteen months in which he had worked in the yard in the same capacity in which he was working at the time of his injury.

V.

The Supreme Court erred in holding that a practice of shunting cars onto adjoining tracks without warning deprived the respondent "of a reasonably safe place to work," and in consequence "he did not assume the risk" of injury therefrom.

VI.

The Supreme Court erred in ruling that the foreman of the switching crew saw or should have seen the respondent in a perilous position and should have taken steps to avoid injuring him.

Wherefore, the petitioner prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Missouri, requiring and directing that Court, by and upon a date certain, to be designated therein, to certify and send to this Court a full, true and complete transcript of the record and proceedings in said court in the cause lately pending therein wherein the respondent, Hilbert Stuart Allen, was the respondent, and the petitioner herein, Toledo, St. Louis & Western Railroad Company, was the appellant, and numbered of that court 25,389; to the end that said record and said cause may be reviewed and determined by this Honorable Court and

whatever of right and justice ought to be done therein may be done, and that your petitioner may have such other and further remedy in the premises as to this Court may seem appropriate and in conformity with law, and that the judgment of the Supreme Court of the State of Missouri in said cause may be reversed and for naught held.

WALTER A. EVERSMAN,
JAMES C. JONES,
LON O. HOCKER,
EDWARD C. CROW,
FRANK H. SULLIVAN,
Counsel for Petitioner.

State of Missouri, }
City of St. Louis. } ss.

Frank H. Sullivan, being duly sworn, upon his oath says that he is one of the counsel for the petitioner herein; that he prepared and is familiar with the contents of the foregoing petition for writ of certiorari, and that the statements therein contained are true, as he verily believes.

Frank H. Sullivan.

Subscribed and sworn to before me this 4th day of January, 1927.

My commission expires March 1, 1927.

Edward W. Lake,

(Seal) Notary Public.

BRIEF.

The jurisdiction of this Court is invoked herein on the ground that the Missouri Supreme Court failed and refused to follow the previous rulings of this Court on the question of the liability of petitioner under the Federal Employers' Liability Act. The original opinion of the Supreme Court of Missouri, affirming the judgment of the trial court against your petitioner, was rendered on August 16, 1926 (R. 320); petitioner's motion for a rehearing was filed in due course and was denied on October 21, 1926 (R. 333), but on said last-named date the Supreme Court filed a modified opinion herein (R. 377, *et seq.*), not yet officially reported. Thereafter, petitioner filed its motion to transfer the cause to the Supreme Court of Missouri en banc (R. 393), which was overruled on December 21, 1926 (R. 411).

That the respondent was engaged in interstate commerce at the time of his injuries is settled (Pecos etc. Railway Co. v. Rosenbloom, 240 U. S. 439).

While it is true that in a proceeding of this character this Court will not undertake to revise the findings of fact of the state court if these find support in the record, it is as equally well-settled that, upon questions such as here, the record will be examined to the extent necessary to ascertain if the findings are supported by the testimony; and if such is not the fact, the case will be dealt with on

the basis of the facts rather than on what the state court have said that these were (Baltimore & Ohio Southwestern Railroad Co. v. Burtch, 263 U. S. 540; Postal Telegraph Co. v. Newport, 247 U. S. 464, and cases cited; Great Northern Railway Co. v. Donaldson, 246 U. S. 121; Baltimore & Ohio Railroad Co. v. Whitacre, 242 U. S. 169).

The opinion prepared by the Commissioner of the Supreme Court of Missouri in this case is somewhat obscure, and there is in consequence some difficulty in ascertaining the exact basis upon which that Court rested its judgment in this case.

Enough appears, however, we think, to make it plain that the Missouri court has herein preferred its own views over those prevailing here as to (a) the duties of railroads in the operation of switch engines in the yards; (b) the risk which employes of such assume, and (c) as to the so-called last-chance or humanitarian doctrine dealt with by the state court in the discussion of this case.

For, an examination of the discussion of these three questions here and there shows a disharmony in the views prevailing, as will be made to appear.

As to Negligence of the Receiver.

This Court examined the question of yard operations in Randall v. Baltimore & Ohio R. R. Co., 109 U. S. 478, l. c. 482-483, where are these observations:

"Tried by this test there was no sufficient evidence of any negligence on the part of the railroad company in the construction and arrangement of the switch to warrant a verdict for the plaintiff on that ground. The testimony of the plaintiff and of his witness was too slight. A railroad yard where trains are made up necessarily has a great number of tracks and switches close to one another, and anyone who enters the service of a railroad corporation, in any work connected with the making up or moving of trains, assumes the risks of that condition of things. Although it was night, and the plaintiff had not been in this yard before, his lantern afforded the means of perceiving the arrangement of the switch and the position of the adjacent tracks. The switch was of a form in common use and was, to say the least, quite as fit for its place and purpose as an upright switch would have been. It could have been safely and efficiently worked by standing opposite the lock, midway between the tracks, using reasonable care; and it was unnecssary, in order to work it, to stand, as the plaintiff did, at the end of the handle, next the adjacent track."

The subject was again considered in Aerkfetz v. Humphreys, 145 U. S. 418, from which we also quote (pp. 419-420):

"There is little dispute in the testimony and the facts, as disclosed, are plainly these: The Delray yard is in the western part of the City of Detroit. In it were twelve tracks and sidetracks, and the yard was used for the making up of trains. A switch engine

was employed therein, and, as might be expected, was constantly moving forwards and backwards, changing cars and making up trains. Plaintiff was a repairer of tracks. He had been employed there about eighteen months, and was familiar with the manner in which the work was done. The yard was about a quarter of a mile in length. The tracks were in a direct line east and west, with nothing to obstruct the view in either direction. At the time of the accident plaintiff was working near the west end of the yard, when a switch engine pushing two cars moved slowly along the track upon which he was at work, the speed of the engine being about that of a man walking. Plaintiff stood with his back to the approaching cars, and so remained at work without looking backward or watching for the moving engine until he was struck and run over by the first car.

"Upon these facts we observe that the plaintiff was an employe, and, therefore, the measure of duty to him was not such as to a passenger or a stranger. As an employe of long experience in that yard, he was familiar with the moving of cars forward and backward by the switch engine. The cars were moved at a slow rate of speed, not greater than that which was customary, and that which was necessary in the making up of trains. For a quarter of a mile east of him there was no obstruction, and by ordinary attention he could have observed the approaching cars. He knew that the switch engine was busy moving cars and making up trains, and that at any minute cars were likely to be moved along the track upon which he was working. With that knowledge he places himself with his face away from the direction from which cars were to be expected, and continues his work with-

out ever turning to look. Abundance of time elapsed between the moment the cars entered upon the track upon which he was working and the moment they struck him. There could have been no thought or expectation on the part of the engineer, or of any other employe, that he, thus at work in a place of danger, would pay no attention to his own safety. Under such circumstances, what negligence can be attributed to the parties in control of the train or the management of the yard They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employe, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employes in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach."

Such are the views of this Court as to the duty of the parties under the circumstances here in question.

On that same subject the Supreme Court of Missouri in the case at bar expresses itself thus (R. 385):

" 'Irrespective of any statute on the subject, the starting or running of a switch engine in a switch yard filled with a network of tracks upon which cars and engines are constantly moving and in which yardmen are constantly at work, without the ringing of a

bell or blowing of a whistle, is evidence of negligence.' This statement is adopted and expressed as the rule by Mr. Thompson in his work on Negligence, Section 4489. (See, also, Kippenbrock v. Railroad, 270 Mo. 479, 483, 194 S. W. 50, and Greenwell v. Railroad [Mo.], 224 S. W. 404, 407, and cases cited.)"

The result is that the Supreme Court of Missouri has disposed of this case on the fundamental basis that obligations rested upon the Receiver toward the respondent as a matter of law, with respect to signaling the movement of engines and cars in the switching yard, which this Court has declared to be nonexistent.

Assumption of Risk.

The Supreme Court of Missouri adheres to the doctrine that the servant does not assume the risk of injury from conditions which ordinary care on the part of the master would require him to obviate, even though the servant have full knowledge of the situation and the risk. This Court *contra.* The opinions in Pryor v. Williams, 272 Mo. 613, 254 U. S. 43, sufficiently illustrate this conflict of view. The question seems to arise upon this record in three aspects:

(a) The trial court authorized the jury to convict the Receiver of negligence by reason of the relative spacing of these switch tracks. While the Supreme Court of the state did not in terms deal with the question, its affirmance of the judgment was in necessary effect an affirmance

of the soundness of the charge to the jury in this respect. But elemental principles often declared by this Court demonstrate that the respondent, familiar as he was with this situation, assumed whatever risk to himself arose therefrom (Pryor v. Williams, 254 U. S. 43, and cases cited; Boldt v. Pennsylvania Railroad, 245 U. S. 441, 445).

(b) The Missouri Court, in dealing with the contention of the petitioner that the respondent assumed the risk arising from shunting cars, said (R. 386):

> "The fallacy of this contention is that by shunting the cinder cars in the nighttime onto the track where it was known that plaintiff was working, without a light or a man on the cars and without warning of any kind, appellant created an unusual hazard."

Of course, the question as to whether or not this was an unusual hazard depends upon what had been the previous practice, as to which we submit:

1. On the uncontradicted evidence the constant practice was to shunt cars without a man or a light thereon.

2. The only warning of such intended movements of which there is any pretense in the testimony is the statement of the plaintiff and his son that, if in the course of their activities, the switchmen chanced to pass near the plaintiff they were wont to tell him of an intention to presently shunt cars in the vicinity; *but, if they did not pass near him, no warning was given.* According to the undisputed facts, on the present occasion, the men did not

pass the plaintiff in the course of their work and hence did not speak to him. On plain principles the risk of shunting cars without this warning was one which the plaintiff was constantly undergoing; he knew that the men were in the yard; he knew that they had not been near his own location and that no opportunity had been afforded them to advise him whether they intended to shunt cars onto the adjoining tracks; and he, therefore, knew that according to the practice prevailing in the yard he must look out for himself in that respect.

With respect to the absence of a man with a lantern on these cars, upon which the Supreme Court based its opinion in large measure that this was an unusual hazard, there is no conflict in the record. There is simply and bluntly no sort of evidence from which it could be found that there was any practice in the yard to have men ride shunted cars with or without lanterns. The evidence is all one way, and all the other way on this proposition. So far as that phase of the opinion of the state court is concerned, the danger was indisputably a usual one. So far as concerns some special warning from his fellow workers, the danger was a usual one, because the respondent knew that he only had warning of shunted *cars when the men were passing around him, and that they had not passed around him on this particular night.*

The ruling of the state court that this was an unusual danger is, therefore, without support in the testimony. On correct principles such movements were one of the

risks of the employment which the respondent understood and assumed, under repeated decisions of this Court.

(c) Perhaps the most obvious error in dealing with this question, to be found in the opinion of the Missouri court, is its observations with respect to the testimony offered by the petitioner showing that the operation which resulted in the accident to the respondent was exactly of the type of that carried on in the yard all the time, and that no custom or practice existed to warn employes of switching movements. Such was, in fact, the overwhelming weight of the testimony. Dealing with that subject, the Court said (R. p. 386):

> "If it be true, as contended by appellant, that according to the practice in defendant's yard cars could be shunted dangerously near to the place where plaintiff was working without any warning to him or knowledge of such custom or practice on his part, *then the system of doing the work was not reasonably safe and plaintiff was not provided with a reasonably safe place in which to work and he did not assume the risk.*"

Here the Missouri court applied its own rule with respect to assumption of risk, rather than that to be extracted from the utterances of this Court on the same subject. As appears from the utterances in Pryor v. Williams, *supra*, the Missouri rule is that the servant is incapacitated to assume the risk of the master's failure to exercise ordinary care to provide the servant with a safe

place to work. The Missouri rule is elaborately set forth in Tetwiler v. Railroad, 242 Mo. 187, cited in the opinion of that court as authority for the disposition of this case. And under that rule the declaration above quoted may have been well enough. But under the utterances of this Court (and most others) the deliverance is unsound (Boldt v. Pennsylvania Railroad, 245 U. S. 441, 445, and cases cited). Here is the crux of this case, and, in large measure, the turning point of the case in the opinion of the Missouri court. Under the rule adhered to by that court if the practice of shunting cars without warning, and of moving engines, with or without cars, without signaling, resulted in making the place of employment less safe than it would have been if these precautions had been observed, the servant, even though with full knowledge and understanding, is incapacitated to assume the risk. Under repeated utterances of this Court if such was the practice in the yard, to the knowledge of the respondent, he assumed the risk of injury therefrom.

Last-Chance Doctrine.

The Missouri formula for the application of this doctrine is that if the defendant (or its representative) either actually saw the peril of the respondent, *or by the exercise of ordinary care might have ascertained it,* steps must be taken to avoid it (State ex rel. v. Trimble, 304 Mo. 533, 543). It was so applied in the charge to the jury by the trial court and the affirmance of the judgment by

the Supreme Court of the state in necessary effect affirmed the soundness of the charge in this respect.

But the decisions here require actual knowledge of the conditions to bring that rule into play, and do not admit of the application thereof to a mere failure to ascertain the perilous situation (St. Louis etc. Ry. Co. v. Shumacher, 152 U. S. 77, 81; Inland etc. Steamship Co. v. Tolson, 139 U. S. 551, 558).

In dealing with that question in the case at bar the Missouri court made these observations (R. 389, 390):

> "The evidence shows, without any controversy, that Murdock, the switch foreman, saw and knew of the plaintiff's perilous position in the unlighted yard between the tracks and must have known that the track was not clear, and should have realized that to undertake, in these circumstances, to send the blind cars noiselessly past plaintiff without warning exposed him to an unknown peril. * * * Murdock saw plaintiff in this perilous condition and could have called to him or warned him, but did not do so."

This serves to mark the most serious departure of the learned Commissioner who wrote the opinion from the established facts in the case. As has been pointed out in the petition for the writ, with references to the record, only Murdock, the foreman of the switching crew, saw the respondent at all; and this whole matter rests upon his testimony alone. He saw a lantern which he assumed to be carried by the respondent. That the respondent was in a

position of peril, or oblivious to the switching operations going on, Murdock did not know, and, in the very nature of things, could not possibly have discovered.

Respectfully submitted,

WALTER A. EVERSMAN,
JAMES C. JONES,
EDWARD C. CROW,
LON O. HOCKER,
FRANK H. SULLIVAN,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

No. 160

TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY,
Petitioner,
vs.
HILBERT STUART ALLEN,
Respondent.

BRIEF AND ARGUMENT FOR PETITIONER.

WALTER A. EVERSMAN,
JAMES C. JONES,
LON O. HOCKER,
FRANK H. SULLIVAN,
Counsel for Petitioner.

(32,890)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

No. 823.

TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY,
Petitioner,

vs.

HILBERT STUART ALLEN,
Respondent.

BRIEF AND ARGUMENT FOR PETITIONER.

HISTORY OF THE CASE.

The respondent, Allen, brought this action in the Circuit Court of the City of St. Louis, Missouri, against a Receiver, who was then operating the petitioners' railway system, claiming damages for personal injuries suffered while in the employ of the Receiver. Pending the action the Receiver was discharged and possession of its road restored to the petitioner upon condition that the latter

assume obligations incurred by the Receiver while engaged in the operation of the road (R. 22). Thereafter the petitioner was substituted for the Receiver as defendant in the instant case (R. 4).

Following a trial there was verdict and judgment for the respondent (R. 16), from which the petitioner appealed to the Supreme Court of the state (Id.). In that court two opinions (R. 256, 266) were written by a Commissioner of the court (one in response to a petition for rehearing), the judgment was affirmed (R. 255), a rehearing was denied October 21, 1926 (R. 265), and in apt time, to wit, January 10, 1927, this writ of certiorari was applied for, and thereafter allowed (R. 288).

The Facts.

The petitioner owns, and the Receiver was operating at the time of the accident of respondent, a railroad switching yard at Madison, in the State of Illinois, in which trains were regularly made up for movement over the railroad of the petitioner. A portion of this yard consisted of a lead track with various sidetracks, each such sidetrack running off the lead track and parallel with the other sidetracks, and connected with the lead track by means of switch stands. A plat appearing in the record, at page 86, will serve to show the relative location of the switch tracks so far as necessary to the case.

Photographs following page 154 will show the spacing between these tracks when occupied by cars, and the rela-

tion of the space remaining to the space occupied by a human body, and will also visualize the construction of the two cinder cars the movement of which resulted in the injuries complained of.

With these preliminary observations we submit the statement of the Commissioner of the state court as to the evidence offered by the parties litigant at the trial, in so far as the same seems consistent with the record, indicating in notes following the respects wherein we think the learned Commissioner has misconceived the record.

Plaintiff's Evidence as Stated by the Commissioner.

(R. 266 et seq.)

"The testimony for plaintiff is that he had been employed as a car checker for about eighteen months in the yards of the company at Madison, Illinois. There were a number of sidetracks connected with a lead track running east and west. Plaintiff's hours of labor were from 11 p. m. to 7 a. m. His duties were to check the cars in freight trains, note the numbers and initials of cars and numbers of seals on sealed cars and their destinations, and write out a train sheet so the conductor of the train could recheck and get ready to leave on time. Plaintiff reported to the yardmaster, Flack, and went to work at 11 p. m. on October 26, 1922. He checked a train of about thirty-four cars on track 6, and while preparing the train

sheet the train dispatcher sent in an order to let that train go out with only nineteen cars and pick up others at Edwardsville. While Murdock, the switch foreman, and plaintiff were in the office of the yardmaster Flack ordered Murdock to make up a train on track 5 to leave at 2:30 a. m. for points in Indiana and Ohio and directed plaintiff to check the cars.

"Plaintiff began at the west end of the train, between tracks 4 and 5 on the north side of the cars, facing the south, with his left arm through the bail of his lantern and the lantern on his shoulder. He was proceeding in the customary manner, standing about three feet back from a car he was checking, when, about 1:15 a. m., he was struck, run over, dragged and injured by a cinder car which was kicked or shunted west by the switching crew and engine on track 4, without any warning whatever. There was no man or light on the cinder car. Murdock, the foreman of the switching crew, knew that plaintiff was engaged in his duties between tracks 4 and 5; in fact, saw him at a distance of 100 or 125 yards (or one whom he assumed was the plaintiff), with his lantern, engaged in checking the train, when he (Murdock) cut loose two cinder cars from a string of cars being moved west on the lead track and shunted them onto track 4, where they moved west at a speed of four to six miles per hour and ran over the plaintiff. They made little, if any, noise and were not heard or seen by plaintiff. Murdock's purpose was to make up a local freight train on

track 4, due to leave at 7 a. m. Track 4 was clear when plaintiff began to check the train on track 5, and he believed the switching was all done, and was not informed there would be other switching in the yard before the departure of the train which he was checking. The clearance between the car plaintiff was checking and the cinder cars was about 2 feet 9 inches, without considering the grab irons on the cinder cars, which projected 4¼ inches from each corner.

"The switch yard was not lighted and there was no moon on the night plaintiff was injured. When the engine was about to be moved it was customary to ring the bell if anyone was working near by. It was customary, when plaintiff was engaged in checking cars, for passing switchmen to tell him if cars were to be switched by the place where he was working; that when he knew cars were coming down on another track plaintiff would flatten himself up against the car he was checking and allow them to pass him; that he had only half the usual time in which to do his checking and get the train sheet to the conductor; that when Murdock, the switch foreman, was about to cut the cinder cars loose from a string of cars which the engine was pushing on the lead track he gave the usual highball and stop signals with his lantern, which were relayed to the engineer (who was on the north side of the engine and could not see plaintiff); these signals were received by the engineer, the cars were cut loose and shunted west on track 4, but no signal of this

movement was given by bell, whistle or otherwise; that Murdock, from his position, could have called to plaintiff, but he did not do so *because he did not think plaintiff was in any danger from the cars;* * * *

"Further testimony is that plaintiff's duties took him into all parts of the yard where he knew the crew would be switching cars, but ordinarily trains would be made up before he would go out to check them; that they hardly ever made up another train on a track where he was checking a train. It is conceded that the company had no rules regulating the movement of the engine or cars in making up trains or shunting cars in the yard, or for giving signals to car checkers or other employes in the yards to warn them of such movements.

"Plaintiff did not see or hear the cinder cars moving toward him. He felt something strike him and he was at once thrown down, run over and dragged under the car."

Defendant's Evidence as Stated by the Commissioner.

(R. 268 et seq.)

"The evidence for the defendant, including the testimony of one or two members of the switching crew, who were plaintiff's witnesses, is that it is not usual or customary to give car checkers or other employes in the yard notice or warning by bell, whistle, or otherwise, of the movements of the engine or cars in the yard, or of the shunting or kicking of cars on or along a track or side-

track; that it is the custom for all such employes to look out for their own safety during such operations; nor is it customary to put a light or to station a man on the end of a car that is being so moved or shunted to warn employes in the yard. No member of the switching crew, except Murdock, the foreman, saw plaintiff in the yard, or knew that he was engaged in checking the train on track 5 at the time the cinder cars were shunted onto track 4, or knew that such movement would be attended with risk or danger to him" (R. 378, 379, 380).

Additional Observations.

1. The plaintiff's work as car checker during the eighteen months of his employ was regularly performed at night (R. 61).

2. The manner in which the two cinder cars were handled and moved on this occasion was the usual and customary method of handling cars in the yard when occasion required (R. 68).

3. Some, at least, of the cars which the plaintiff was engaged in checking were to move in interstate commerce (R. 90, 39).

4. The plaintiff, as a witness, described the night as just an ordinary night, except that the moon was not shining (R. 91). Other witnesses described it as a clear, starlight night (R. 50, 134).

5. The effect of the testimony offered at the trial by the plaintiff as to warning from switchmen, when cars were

to be shunted or switched in his vicinity, is overstated by the learned Commissioner of the State Court who prepared the opinions of that tribunal. The plaintiff himself said *if the switchmen happened to pass in his vicinity* they would tell him they were presently intending to switch other cars onto the track on which he was working, or onto adjoining tracks, if such were the fact (R. 94, 95). His son, who was a switchman, and who testified for the respondent, made the same statement, but added that *if the switchmen were not brought near the checker in the course of their duties he was not furnished with such information* (R. 117). There was no other testimony on that subject, and the undisputed facts show that on the night of the accident the switchmen were not in the plaintiff's vicinity after he began his duties (R. 117 et seq.).

6. The plaintiff knew the switching crew was working in the yard and making up a train in his vicinity (R. 105). His testimony shows that he made no effort to keep himself informed as to what this switching crew was doing (R. 87-107).

7. The statements of the Commissioner as to the knowledge of Murdock, the foreman of the switching crew, of the position of the plaintiff at the time the cars were shunted onto track No. 4 on the orders of Murdock is not supported by the record. The photographs make plain the fact that an employe engaged in switching cars has ample room between the tracks without subjecting himself to risk. Murdock was one hundred and twenty-five

yards away from the plaintiff at the time the two cars were, upon his order, shunted onto the track adjoining that at which the plaintiff was working. The only witness who testified to what Murdock could or could not observe was Murdock himself. All he could see was a lantern, which he assumed to be carried by the plaintiff merely from his knowledge of the plaintiff's duties. Murdock did not know, and could not possibly have ascertained, that the plaintiff had placed himself so near to track No. 4 as to be in danger from the movement of cars thereon. On this there is no conflict in the testimony (R. 52, 65, 68, 70 and 77).

8. The clicking of the car wheels over the joints of the rails was audible one or two car lengths away (R. 133).

9. Murdock, the foreman of the switching crew, uncoupled the two cinder cars from the train of twenty or twenty-five, of which they were the rearmost, signaled with his lantern for the kick from the engine, signaled for the stop when the engine had communicated the desired *momentum* to the two cars, and then signaled for the engine to proceed in the reverse direction. All these signals he gave with his lantern, not directly to the engineer, but to Allen, the switchman, who repeated them in relay with his lamp (R. 31, 32, 33, 66, 67).

The Charge.

The trial court authorized the jury to convict the Receiver of negligence in the following respects (R. 241 *et seq.*):

(a) If the jury believed the space between the tracks in the yard was so restricted as to be dangerous to the plaintiff;

(b) If Murdock, in the act of causing the cars to be shunted onto the adjoining track, was aware that the respondent had placed himself in a position of peril and was oblivious thereto, *or if Murdock might have ascertained this situation by the exercise of ordinary care;*

(c) If the jury regarded it as dangerous to shunt the cars onto the adjoining track without lights and with no one riding thereon;

(d) If the movement was made without causing the bell to be rung on the engine;

(e) If the place where plaintiff was working at the time he was injured was dark and unlighted;

(f) If the moving cars, when "kicked" down track No. 4, and at the time of and just before striking plaintiff, were unlighted, and had no one riding on said cars.

The trial court refused:

(a) To direct a verdict for the defendant (R. 241, 247);

(b) To withdraw from the jury the charge of negligence that the defendant failed to ring the bell or to have a man ride the shunted cars (R. 248);

(c) To withdraw from the jury the charge of negligence that the defendant failed to maintain a proper, adequate and safe width between the tracks (R. 249);

(d) To withdraw from the jury the charge of negligence that the employes of the Receiver saw, or by the exercise of ordinary care could have seen, the plaintiff in a position of peril in time to avoid injuring him (Id.).

(e) To charge that if it was the custom of the defendant in its yards at Madison, Illinois, not to give warning to car checkers of car movements therein, and the plaintiff knew of such custom, he assumed the risks incident to that method of operation (R. 250);

(f) To withdraw from the jury the charge of negligence that the defendant failed to promulgate safe and proper rules for the protection of persons working in the defendant's yards at Madison, Illinois (R. 248).

The Opinion of the State Supreme Court.

The State Supreme Court affirmed the judgment of the trial court. Not all the assignments of error urged by the defendant were discussed in the opinion of the learned Commissioner who spoke for the Court. Indeed, with no intention unduly to criticise the opinions, we are constrained to say that the reasoning thereof is somewhat obscure, and, in consequence, we find it difficult to state just what principles of law the Court has laid down.

In the original opinion these propositions seem to be declared:

(a) That it was negligence on the part of the defendant to switch cars in its yards at Madison, Illinois, without ringing the engine bell or blowing the whistle so as to warn employes in the yard thereof.

(b) That shunting the two cars along the adjoining tracks without a light or a man riding them created an unusual hazard, which the plaintiff did not assume, even though the plaintiff knew that it was the custom of the defendant so to shunt cars in its yards at Madison, Illinois.

(c) If it was the custom so to shunt cars without a light or a man riding thereon or without warning, then the Receiver had not provided the plaintiff with a safe place to work, and the risk arising from the failure so to do was not assumed by the plaintiff.

(d) Upon these principles it was affirmed by the State Court that the verdict and judgment below were for the right party, whether the rulings below on the charge were well or ill (R. 256-265).

On a petition for a rehearing, proposition (c) was modified (R. 274) so as to assert that the custom of shunting cars without warning created a dangerous hazard which the plaintiff did not assume if he had no knowledge of the custom (R. 274).

SPECIFICATIONS OF ERROR.

The errors assigned in the petition for the writ, and now urged, are:

I.

The judgment of affirmance, although not dealing with the question, necessarily affirmed the action of the lower court in authorizing the jury to convict the Receiver of negligence based upon the manner in which the engineers of the petitioner had located these tracks with respect to each other, whereas, on correct principles, often declared and enforced by this Court, the respondent assumed whatever risk was involved in working under such conditions.

II.

The State Supreme Court affirmed the view of the court below that it was negligence on the part of the Receiver not to have someone ride these shunted cars with a light and so as to control their movements, ignoring the uncontradicted testimony that the custom of the yard was to do as was done on this occasion, and the respondent must needs have known the fact and assumed the risk under principles often declared by this Court.

III.

The Supreme Court approved and applied to the case (R. 385) its own previously expressed view (Tetwiler v. Railroad, 242 Mo. 178) that it was negligence to move the switch engine without ringing the bell, rather than the view of this Court (Randall v. Baltimore & Ohio Railroad Co., 109 U. S. 482; Aerkfetz v. Humphreys, 145 U. S. 418) that the ringing of the bell in railroad switching yards as a warning to employes leads to confusion and fails, therefore, of its purpose, and that negligence cannot be predicated upon a practice not to warn under such circumstances.

IV.

The Supreme Court of the state erred in classing the shunting of these two cars without a man or light on them as an unusual hazard which the respondent did not assume, in view of the uncontradicted testimony that it was the custom and practice so to do in the defendant's yards, and to the full knowledge of the plaintiff during the eighteen months he had worked in the yard as a car checker.

V.

The Supreme Court erred in holding that a practice of shunting cars onto adjoining tracks without warning de-

prived the plaintiff "of a reasonably safe place to work" and in consequence "he did not assume the risk" of injury therefrom.

VI.

The Supreme Court erred in ruling that the foreman of the switching crew saw or should have seen the plaintiff in a perilous position and should have taken steps to avoid injuring him.

BRIEF.

I.

The plaintiff, checking cars, some of which were to move in interstate commerce, was engaged in such commerce within the Federal Employers' Liability Act.

Pecos etc. Railway Co. v. Rosenbloom, 240 U. S. 439.

II.

In such cases certiorari lies to review the judgment of the highest court of the state.

Judicial Code, Sec. 237;
Chicago etc. Railway Co. v. Coogan, 271 U. S. 474.

III.

The facts will be reviewed here to determine if they support the judgment below.

Chicago etc. Railway Co. v. Coogan, supra, and cases cited.

IV.

The rules of law enforced here control the rights of the parties.

New Orleans etc. Railway Co. v. Harris, 247 U. S. 371;
Chicago etc. Railway Co. v. Coogan, supra.

V.

The plaintiff assumed whatever risks were involved in the manner in which the yards were constructed and the usual train movements therein.

Boldt v. Pennsylvania R. R. Co., 245 U. S. 445;
Chesapeake etc. Ry. Co. v. Nixon, 271 U. S. 219;
Tuttle v. Milwaukee Rwy., 122 U. S. 189;
Randall v. Baltimore etc. Railway Co., 109 U. S. 478;
Connelley v. Pensylvania R. Co., 201 Fed. 54, approved in Railway Co. v. Nixon, 271 U. S. 219.

VI.

In switching operations the lack of signals is not negligence.

Aerkfetz v. Humphreys, 145 U. S. 420;
Chesapeake etc. Ry. Co. v. Nixon, 271 U. S. 219;
Reading Co. v. Haldeman, 20 F. (2d) 53 (C. C. A. 3rd).

VII.

Those in charge of the train movement could not be required to take special efforts to avoid injury to the plaintiff unless his peril was known to them.

St. Louis etc. Ry. Co. v. Shumacher, 152 U. S. 77;
Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551;
Aerkfetz v. Humphreys, 145 U. S. 420.

VIII.

An experienced railroad employe who is familiar with the custom of switching cars without providing them with a lookout or lights assumes the risk of injury resulting from such custom and is precluded from recovering for injuries suffered by reason thereof under the Federal Employers' Liability Act.

Southern Pacific Co. v. Berkshire, 254 U. S. 415;
Seaboard Air Line Ry. v. Horton, 233 U. S. 492;
Jacobs v. Southern R. R., 241 U. S. 229;
Gilmer v. Yazoo & M. V. R. Co., 4 F. (2nd) 963 (certiorari denied, 268 U. S. 639).

ARGUMENT.

Preliminary Observations.

The plaintiff was engaged in checking cars, some of which were to move in interstate commerce. The controversy is, therefore, controlled by the Federal Employers' Liability Act. It was so held in Pecos etc. Railway Company v. Rosenbloom, 240 U. S. 439. The right of review by certiorari here is settled (Judicial Code, Sec. 237; Chicago etc. Railway Co. v. Coogan, 271 U. S. 474).

The facts in the case are here open to inquiry. As said in Chicago etc. Railway Co. v. Coogan, 271 U. S. 472, 474:

> "This Court will examine the record, and if it is found that as a matter of law the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed (St. L. & Iron Mtn. Ry. v. McWhirter, 229 U. S. 265, 277; New Orleans & N. E. R. R. Co. v. Harris, 247 U. S. 367, 371; New Orleans & N. E. R. R. Co. v. Scarlet, 249 U. S. 528)."

Nor are the rights and liabilities of the parties litigant to be determined by the rules of law declared and enforced in the local jurisdiction where the controversy arose.

As was observed in New Orleans etc. Railway Co. v. Harris, 247 U. S. 367, l. c. 371:

> "In proceedings brought under the Federal Employers' Liability Act rights and obligations depend upon it and applicable principles of common law as interpreted and applied in federal courts; * * * ."

To like effect is Chicago etc. Railway Co. v. Coogan, supra.

We think the record in this case discloses that the Missouri courts have applied principles of law which are alien to this jurisdiction in respect of the duties and obligations of interstate rail carriers in yard operations, as well as in respect of the risks assumed by the employes of such carriers when they undertake the employment. The two opinions of the Commissioner are apparently based in large measure upon the so-called last-chance, or humanitarian, doctrine, which this Court in Pryor v. Williams, 254 U. S. 43, expressly repudiated, in so far as its application to cases coming under the Federal Employers' Liability Act is concerned, and which, when applicable, rests upon principles here differing from those prevailing in Missouri.

Yard Construction.

The trial court instructed the jury to find the defendant guilty of negligence, if it found that the space between the switching tracks in the yard was too narrow (R. 242-3).

The defendant's request that the Court charge the jury that the plaintiff could not recover because of the "width between the tracks" was denied (R. 249 F).

As to the claim that the space between the tracks was too narrow, it is to be observed that, while there was testimony as to how a car checker would stand, how he would carry his lantern, etc., etc., the photographs following page 154 of the record conclusively demonstrate that the space between the tracks was sufficient for a man to pass along and take down the numbers and initials of cars without risk from movements on the adjoining track if he but observed due care to keep himself within the safety zone. There was, therefore, really no support in the record for the claim—quite apart from the question of the risk assumed by plaintiff—that the tracks in the yards were too close for a car checker to work in safety.

Even if it were conceded that the defendant was negligent in the construction of its yards, this Court has repeatedly held that the risks incident to such construction are assumed by the employe and that the employe is precluded from recovery for injuries resulting therefrom.

The plaintiff had worked daily for a year and one-half or more in these yards and among these tracks and must have necessarily observed their relative location.

The Commissioner did not definitely repudiate the principle of law just recited, but the affirmance of the judgment below was in effect a tacit approval of the ruling of the trial court that the plaintiff had a right of recov-

ery because of the narrow space between the tracks and the yard, notwithstanding his intimate knowledge and daily observation of the construction of the tracks.

The conflict between the rule of assumption of risk, as applied by the Missouri Supreme Court and as applied by this Court, is evidenced by the decision in Williams v. Pryor, 272 Mo. 621, and Pryor v. Williams, 254 U. S. 43. The Missouri Court, in the former case, expressed itself thus:

> "It is the unbroken rule in Missouri that the servant never assumes the risk, where such risk grows out of the negligence of the master (Fish v. Railway, 263 Mo., l. c. 125; Charlton v. Railroad, 200 Mo., l. c. 433; Patrum v. Railroad, 259 Mo., l. c. 124; George v. Railroad, 225 Mo., l. c. 407). These cases and the cases cited therein thoroughly state the rule and reasons therefor. Thus, in the Charlton case, it is said, 'Assumption of risks rests on contract—negligence rests in tort (Dale v. Hill-O'Meara Construction Co., 108 Mo. App., l. c. 97). The servant, when he enters his master's employ, impliedly agrees with him, for the compensation named, to assume the risk of usual dangers incident to the work. But the servant does not assume the risk of the master's negligence for a very good reason, and that is because it is a fundamental proposition that it is against public policy for a master to contract against his own negligence. So, too, in the assumption of risks by a servant, it is well to consider a certain assumption by the master, and that is, that the master impliedly contracts with the servant that

he will exercise ordinary care to protect such servant from injury by providing a reasonably safe place for him to work. When these two assumptions are considered as proceeding hand in hand, it will be perceived that the risks assumed by the servant are those risks alone which remain after the master has exercised ordinary care.' "

That judgment was reversed by this Court because the views expressed and applied did not conform to the settled rule of decision here. The rule here is, under the Federal Employers' Liability Act as at common law, "that a servant assumes extraordinary risks incident to his employment or risks caused by the master's negligence which are obvious and fully known and appreciated by him."

Boldt v. Pennsylvania R. R. Co., 245 U. S. 445;
Chesapeake etc. Ry. Co. v. Nixon, 218 U. S. 219, and cases cited.

While the Missouri Court did not, in its opinion, expressly repudiate the rule of this Court as to the assumption of risk in cases coming under the Federal Employers' Liability Act, its judgment is squarely in conflict therewith.

This aspect of the case, therefore, finds its parallel in Pryor v. Williams, *supra.*

True, the trial court gave an instruction on this question (R. 246), but this instruction conflicts with that given for the plaintiff (R. 243); and the request to withdraw

that entire question from the jury, as should have been done, was denied (R. 249 F). It is patently impossible for the plaintiff to have worked daily for a year and a half in this yard without ascertaining its construction. Wherefore he assumed whatever risk this involved and the whole question should have been withdrawn from the jury.

Absence of Signals.

The jury were authorized to convict the Receiver of negligence because the bell upon the engine was not rung during the car movement of which respondent complains (R. 244), and the trial court refused to charge that it was not the duty of the Receiver to cause this to be done (R. 248 D and E). The Supreme Court of the State, in both its original (R. 263) and final opinions (R. 273) affirmed this ruling upon its concept of the common-law duty of the Receiver in switching operations, saying:

> "Irrespective of any statute on the subject, the starting or running of a switch engine in a switch yard filled with a network of tracks upon which cars and engines are constantly moving and in which yardmen are constantly at work, without the ringing of a bell or the blowing of a whistle, is evidence of negligence."

This Court reached a diametrically opposite conclusion in Aerkfetz v. Humphreys, 145 U. S. 418, 420, saying:

> "Under such circumstances, what negligence can be attributed to the parties in control of the train or the

> management of the yard? They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employe, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion."

In Connelley v. Pennsylvania R. Co., 201 Fed. 57, the Circuit Court of Appeals for the Third Circuit held:

> " 'An elaborate system of signals by ringing bells, sounding whistles, swinging lanterns and waving flags, designed to cover the erratic movements of switching engines and extra freight trains, would quite likely have tended to complicate and confuse the situation.' "

That opinion was cited with approval here in Ohio etc. Railway Co. v. Nixon, 271 U. S. 219.

The judgment of the Missouri Court, both in effect and in express pronouncement, is directly in conflict with the views of this Court on this phase of the case.

Car Movement.

The jury were permitted to consider whether the shunting of the cars along the track without a man or light thereon was an act of negligence (R. 244), notwithstanding the request of defendant's counsel that this element be

removed from the consideration of the jury (R. 248 D and E). The State Court dealt with this question in both opinions. In the original opinion (R. 264) the Commissioner said:

> "The fallacy of this contention is that by shunting the cinder cars in the nighttime onto the track where plaintiff was working, without a light or a man on the cars, and without warning of any kind, appellant created an unusual hazard. If it be true, as contended by appellant, that according to the practice in defendant's yard, cars could be shunted dangerously near to the place where plaintiff was working without any warning to him, then the system of doing the work was not reasonably safe and plaintiff was not provided with a reasonably safe place in which to work and he did not assume the risk. The contention is clearly opposed to the rulings of the Proffitt and Tetwiler cases, supra."

The Tetweiler case, 242 Mo. 187, referred to in this excerpt, merely reaffirms the doctrine of the Missouri Supreme Court on assumption of risk. The Proffitt case (241 U. S. 461), referred to in the Commissioner's opinion, holds that the servant does not assume the risk of unusual hazards which are not obvious and of which he is unaware.

In the final opinion (R. 274) the State Court added to the excerpt just quoted the words shown in italics below (R. 274):

> "The fallacy of this contention is that by shunting the cinder cars in the nighttime onto the track where

it was known that plaintiff was working, without a light or a man on the cars, and without warning of any kind, appellant created an unusual hazard. If it be true, as contended by appellant, that according to the practice in defendant's yard cars could be shunted dangerously near to the place where plaintiff was working, without any warning to him *or knowledge of such custom or practice on his part*, then the system of doing the work was not reasonably safe and plaintiff was not provided with a reasonably safe place in which to work and did not assume the risk."

The qualifying words "without knowledge of such custom or practice on his part," if they were well founded under the testimony in this case, would bring the case within principles declared in the Proffitt case. There is, however, no support in the record for the statement that the plaintiff did not know of the practice of shunting cars without warning. The method employed of shunting cars at the time plaintiff was injured was precisely the same method that had been employed all the enghteen months plaintiff had been employed as a car checker in defendant's yards (R. 68). The only suggestion in the testimony that there was a practice of giving warning that cars were to be shunted was the testimony of the plaintiff (R. 94, 95) and his son, a switchman (R. 135), that if switchmen chanced, in the course of their labors, to pass near a car checker they might tell the car checker that they were intending presently to shunt cars in his vicinity; but they both said that unless switchmen chanced to pass no warn-

ing of such movement was given (R. 135). The learned Commissioner correctly stated the effect of the uncontradicted testimony when he said (R. 271):

> "The testimony of defendant showed that these tracks had been used fifteen years in the same condition in which they were at the time of plaintiff's injury; that plaintiff had worked in these yards at night, performing the same duties he was performing when he was injured, one and one-half years, and that his duties carried him to all portions of the yard; that he was thoroughly familiar with the movement of cars, and that he was aware that no signals were customarily given when cars were moved in the switch yards."

That these were the uncontradicted facts is shown by his further observations (R. 274):

> "There is really no controversy about the facts, the contention being that it was not customary to warn a car checker of the movement of cars in the switch yard; that plaintiff was required to look after his own safety; that he assumed the risk of being struck by the cinder cars, and that on the evidence the Court should have directed a verdict for the defendant."

The respondent had worked in the yard, in this same position, for a year and a half. He must have known the custom of the yard in car movements. Indeed, his own testimony, referred to above, shows that he did know it. The intimation that he may not have known of it has no support.

In Randall v. Baltimore etc. Railway Co., 109 U. S. 478, it is said:

> "Tried by this test there was not sufficient evidence of any negligence on the part of the railroad company in the construction and arrangement of the switch to warrant a verdict for the plaintiff on that ground. The testimony of the plaintiff and of his witness was too slight. A railroad yard where trains are made up necessarily has a great number of tracks and switches close to one another, and anyone who enters the service of a railroad corporation, in any work connected with the making up or moving of trains, assumes the risks of that condition of things. Although it was night, and the plaintiff had not been in this yard before, his lantern afforded the means of perceiving the arrangement of the switch and the position of the adjacent tracks. The switch was of a form in common use and was, to say the least, quite as fit for its place and purpose as an upright switch would have been. It could have been safely and efficiently worked by standing opposite the lock, midway between the tracks, using reasonable care: and it was unnecessary, in order to work it, to stand, as the plaintiff did, at the end of the handle, next the adjacent track."

In Aerkfetz v. Humphreys, 145 U. S. 418, it was observed, with respect to switch movements in yards:

> "There could have been no thought or expectation on the part of the engineer, or of any other employe, that he, thus at work in a place of danger, would pay no attention to his own safety. Under such circum-

stances what negligence can be attributed to the parties in control of the train or the management of the yard? They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employe, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employes in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach."

To like effect is Chesapeake etc. Railway Co. v. Nixon, 271 U. S. 219, and cases there cited.

The defendant requested the following charge on the question now under discussion:

"The Court instructs the jury that if you find from the evidence that it was the custom and method of the defendant, in the operation of its yards in Madison, Illinois, not to have the trainmen or the enginemen give warning to car checkers while they were in the performance of their duties in said yard, and that plaintiff knew of such custom and method on the part of the defendant, then the plaintiff assumed the risks and dangers incident thereto and cannot recover in this case upon the ground of the failure to warn him in connection with the switching of the cinder cars on track No. 4."

The trial court declined to give this charge.

It is obvious that this request embodied correct principles as applied to the conceded facts. In its final opinion the State Court recognized the propriety of the request (R. 278), but held that its refusal by the trial court was not error because it was covered by defendant's instruction No. 5, which was given. This latter instruction is set out by the Court in its opinion at page 276 of the record. It deals only with the construction of the track and has no reference to the operation of trains thereon. It is obvious that the two instructions cover entirely different and unrelated matters.

Last Chance.

We think the judgment of the Missouri Court is based largely on the Missouri last-chance or humanitarian doctrine, which, when applied to this case, would hold the defendant liable in damages if Murdock, the foreman of the crew, who gave the order for the shunting of the cars, saw, or *in the exercise of ordinary care should have seen* the plaintiff in a perilous position and took no steps to avoid the accident.

The trial court, by its charge, instructed the jury to find for the plaintiff if the employe of the Receiver, in charge of the car movement, knew, *or by the exercise of ordinary care to that end might have known, that the plaintiff* was in a position of peril and failed to take steps to avoid injuring him (R. 243).

This instruction was quite in keeping with the doctrine of the Missouri Court, just referred to, that, notwithstanding the negligence of the injured party in placing himself in a position of peril, if the defendant knew of the peril, *or by ordinary care might have learned of it*, in time to avoid it, there is a right of recovery. (See State ex rel. v. Trimble, 314 Mo. 533, 534.)

But the rule, under the decisions here, requires *actual knowledge of, and not merely negligence in failing to discover* the perilous situation in order to entitle the person who, by his own negligence, has placed himself in a position of peril, to recover.

> St. Louis etc. Ry. Co. v. Shumacher, 152 U. S. 77, 81; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 558.

On this subject the State Supreme Court said in its final opinion (R. 277):

> "Appellant's learned counsel argue that although defendant's employes knew of plaintiff's perilous position between the two tracks in the dark and unlighted yard, yet they contend that defendant had the right to expect a clear track, and that its employes in these circumstances might with impunity shunt these unlighted cars past plaintiff while he was so engaged, without any warning, and that by the custom and practice in the yard plaintiff was required to look after his own safety and that he assumed such unknown hazard as a risk incident to his employment. We are not dealing with a theory merely, but with a

condition. The evidence shows, without any controversy, that Murdock, the switch foreman, saw and knew of the plaintiff's perilous position in the unlighted yard between the tracks, and must have known that the track was not clear, and should have realized that to undertake, in these circumstances, to send the blind cars noiselessly past plaintiff, without warning, exposed him to an unknown peril."

And, again (R. 278):

"Murdock saw plaintiff in this perilous position and could have called to him or warned him, but did not do so. It was on this failure to warn, and not on the proximity of the tracks, that plaintiff's instruction predicated his right to recover. The proximity of the tracks made the shunting of the cars, without warning of any kind, an unusual hazard."

The statement of the Commissioner that in the argument before him defendant's counsel contended that, even though defendant's employes knew of plaintiff's perilous position between the two tracks, the defendant, nevertheless, owed plaintiff no duty to avoid the accident. Appellant's counsel made no such argument and does not so understand the law. Defendant's counsel has always maintained that, under the uncontradicted testimony in this case, there is absolutely no support for the statement that Murdock, the foreman of the crew, or any other of defendant's employes, knew that plaintiff was in a perilous position at the time of the shunting of the car.

In the second excerpt from the Commissioner's opinion the statement is again made that Murdock saw the plaintiff in a perilous position. This statement, as we have already said, is without support in the record.

Murdock was 125 yards away from the plaintiff when he directed the movement of the cinder car. The only witness who testified as to what Murdock could or could not observe on this occasion was Murdock himself. He testified that all that he could see was a lantern, which he assumed the plaintiff was carrying merely because he knew the plaintiff was working in that vicinity. As to whether the plaintiff was within or without the rails of track 4, or between that track and the adjacent one, Murdock did not know and, in the very nature of things, could not possibly have discovered (R. 52-64, 65-68-70-77). Murdock acted on that occasion upon the assumption that the plaintiff would protect himself as the shunted cars approached him—an assumption which this Court, in Aerkfetz v. Humphreys, 145 U. S. 418, 420, asserted a person in charge of a movement of cars under very similar circumstances was justified in making. The Court there said:

> "The person in direct charge had a right to act on the belief that the various employes in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach."

As to the shunting of the cars without warning, the uncontradicted testimony in this case is, as has already been

noted, that it was the usual practice to shunt cars in the yard without warning and that the only time warning was given of such a movement was when the members of the switching crew chanced to pass in the vicinity where the car checker was employed, and that, in such cases, they might inform him that they presently intended to shunt cars in his direction. We have heretofore referred to the record in this respect (R. 94, 95-135).

General Observations.

The principles of negligence at common law which are controlling in this case are so widely divergent from the principles of the Missouri Supreme Court under the so-called "last-chance or humanitarian doctrine" that it is not surprising that a Missouri court should have a tendency to strain the facts in a case where it is required to apply principles with which it is not in sympathy. Certain it is (and we say it with the utmost respect for the Missouri Court and the learned Commissioner who wrote the opinion in this case) that we have seldom read a judicial opinion where salient facts as disclosed in the record have been so distorted.

The learned Commissioner, no doubt wholly unconsciously, but steeped in home principles, has substituted the facts of the Proffit case for the facts in the case at bar and then has applied to the substituted facts principles of law which lead to the same result that would be ob-

tained if rules declared by the Missouri Court were applied to the facts.

And it may be that, under the peculiar rules recognized by the Missouri Court as respects switching signals, safe place to work (a most misleading formula, because life itself is full of risks and there is no safe place to work), assumption of risk, last chance, etc., the opinions of the learned Commissioner have accurately disposed of the case.

But, far more surely, under the settled doctrines of this Court as applicable to these same propositions, the judgment of the State Court cannot be approved, but should be reversed and the cause remanded for further proceedings.

Respectfully submitted,

WALTER A. EVERSMAN,
JAMES C. JONES,
LON O. HOCKER,
FRANK H. SULLIVAN,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

No. 823.

TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY,
Petitioner,

vs.

HILBERT STUART ALLEN,
Respondent.

BRIEF AND ARGUMENT FOR RESPONDENT.

THE OFFICIAL REPORT OF THE OPINION DELIVERED IN THE COURT BELOW.

Opinion of State Court.

The opinion of the Missouri court of last resort, review of which is sought by petitioner herein, was rendered October 21, 1926 (Rec., p. 265). It is set out in the transcript of record in this court, No. 823, pages 266 to 278, inclusive; is not officially reported in the Missouri Re-

ports, but is found in the Southwestern Reporter, Vol. 292, page 732; was concurred in by all the members of the Division (Rec., p. 279). A petition for rehearing was denied by the same Division (Rec., p. 265).

Although there had been no dissenting opinion filed by any member of the Missouri Supreme Court, petitioner (appellant in that court) filed a motion to set aside the judgment of the Supreme Court and transfer the cause to the Missouri court en banc (Rec., p. 279). This motion (Rec., p. 279), together with suggestions in support thereof which accompanied it (Rec., p. 281), brought before the Missouri Supreme Court every matter here urged under petitioner's "Specifications of Error," on page 13 of their brief and argument.

Apparently, no member of the division of the Supreme Court from which the opinion emanated agreeing with petitioner's reasoning (as our Missouri appellate procedure requires in order to so transfer the cause), this motion was likewise denied (not set out in transcript of record No. 823) but appearing on page 411 of certified copy of transcript of proceedings below, which certified copy this Court, in its order filed February 28, 1927, granting writ of certiorari (Rec., p. 288), ordered to be treated as filed in response to such writ, and which is dated December 20th, 1926, and recites that "the Court, having seen and fully understood the appellant's motion to transfer this cause to the Court en banc, doth order that said motion be, and the same is hereby, overruled."

JURISDICTIONAL MATTERS.

Grounds on which jurisdiction invoked by petitioner.

The judgment dated October 21, 1926.

Specific claims and ruling in lower court as basis of jurisdiction (as claimed by petitioner).

Lack of jurisdiction (as claimed by respondent).

Grounds on Which Jurisdiction Invoked by Petitioner.

The Judgment, Review of Which Is Sought.

The judgment, review of which petitioner seeks, is contained in transcript of record in this cause (pages 266 to 278, inclusive). It was rendered and filed by the Missouri Supreme Court on October 21, 1926 (Rec., p. 265); is not contained in the official volumes of Missouri Reports, but appears in 292 S. W. 732.

Specific Claims and Rulings in Lower Court as Basis of Jurisdiction.

(As claimed by petitioner.)

The petition for writ of certiorari (p. 16) contains the following:

> A. "The jurisdiction of this Court is invoked herein on the ground that the Missouri Supreme Court **failed and refused to follow the previous rulings of this Court** on the question of the liability of petitioner under the Federal Employers' Liability Act."

In petitioner's brief and argument (p. 20) the following appears:

> B. "We think the record in this case discloses that the Missouri courts have applied principles of law which are alien to this jurisdiction in respect of the duties and obligations of interstate rail carriers in yard operations, as well as in respect of the risks assumed by the employes of such carriers when they undertake the employment. The two opinions of the Commissioner are apparently based in large measure upon the so-called last-chance or humanitarian doctrine, which this Court in Pryor v. Williams, 254 U. S. 43, expressly repudiated in so far as its application to cases coming under the Federal Employers' Liability Act is concerned, and which, when applicable, rests upon principles here differing from those prevailing in Missouri." * * *

And on page 21 the following:

> C. "Even if it were conceded that the defendant was negligent in the construction of its yards, this Court has repeatedly held that the risks incident to such construction are assumed by the employe and that the employe is precluded from recovery for injuries resulting therefrom."

From a careful examination of petitioner's brief and argument we believe that all jurisdictional grounds raised by petitioner might be embraced in the above-quoted matter. We undertake hereinafter to show the nonexistence

of such grounds, but first we urge affirmative grounds which we believe will show lack of jurisdiction.

Lack of Jurisdiction.

(As claimed by respondent.)

If the questions of fact found and decided in the state court are adequate to determine the controversy and broad enough to maintain a valid judgment independent of any federal question, this Court is without jurisdiction, even though the state court may have also decided a federal question, and the writ will be denied or the judgment of the state court affirmed.

Capital National Bank of Lincoln v. First National Bank of Ohio, 172 U. S. 425;
Chouteau v. Maffit, 111 U. S. 200;
Kellogg v. King, 245 U. S. 627;
Southern Pacific Co. v. Schuyler, 227 U. S. 601;
Dibble v. Bellingham Bay Land Co., 163 U. S. 63;
Central Vermont R. Co. v. White, 238 U. S. 507.

The act of Congress of February 13, 1925, known as "An act to amend the judicial code and to further define the jurisdiction of the circuit courts of appeals and of the Supreme Court, and for other purposes," conferred no additional jurisdiction on this Court; and such jurisdiction of the subject matter of the present case, if any exists, is by reason of the alleged contravention of a "right, privilege or immunity set up and claimed under a

statute of the United States," to wit, the "Federal Employers' Liability Act" of 1908.

True, petitioner does claim that the Missouri Court determined other grounds of negligence in disharmony with the rulings of this Court, to wit, the doctrine of last-clear chance, and duty to warn, and invokes jurisdiction on that ground; but do those matters involve a federal question? We think not. If there is a federal question here, it is assumption of risk.

The Federal Employers' Liability Act does not undertake to define negligence, except as to assumption of risk; so that, aside from this ground, negligence under the Federal Act is to be determined by the application of the principles of the common law. An examination of the cases in this court since the effective date of the Federal Act does not impress one with the thought that the announced principles under the common law, as regards actionable negligence, have been in any way altered or restricted (Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492).

In affirming the judgment nisi in the present case, the opinion of the Missouri Court, as is apparent on the face thereof (Rec., p. 278), was based on the negligent failure to warn, a nonfederal question, and a question of fact, and broad enough and adequate to determine the controversy and maintain the judgment independent of any federal question, even had there been such.

Nor can petitioner successfully maintain that any right, privilege or immunity was specially set up or claimed under any statute.

The record shows that instead of so setting up and claiming such right, title or immunity by offering and requesting the trial court to give a peremptory instruction on assumption of risk, and either having it sustained, or if it was refused standing on such refusal, that petitioner requested, **and the Court gave, without modification**, an instruction on this very subject. And these matters are apparent on the face of the opinion (Rec., p. 276) as well as by the record (Rec., p. 246).

If the questions of fact found and decided in the state court are adequate to determine the controversy and broad enough to maintain a judgment independent of any federal question, this Court is without jurisdiction, even if the state court may have also decided a federal question.

In Capital National Bank of Lincoln et al. v. First National Bank of Cadiz, Ohio, 172 U. S. 425, this Court, speaking through Mr. Chief Justice Fuller, said:

> "If the denial by the state court of a right under a statute of the United States is relied on as justifying our interposition, before it can be held that the state court thus disposed of a federal question, the record must show, either by the words used or by clear and necessary intendment therefrom, that the right was specifically claimed; or a definite issue as to the possession of the right must be dis-

tinctly deducible from the record, without an adverse decision of which the judgment could not have been rendered.

"Moreover, even though a federal question may have been raised and decided, yet if a question, not federal, is also raised and decided, and the decision of that question is sufficient to support the judgment, this Court will not review the judgment."

In discussing the necessity that the decision below involves a federal question, this Court, in **Chouteau v. Maffit, 111 U. S. 200**, said:

"From the beginning it has been held that, to give us jurisdiction in this class of cases, it must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest court of the state for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case."

This rule has been announced in varying language many times, and **Chouteau v. Maffit**, supra, has been affirmed on this point in the comparatively recent case of **Kellogg v. King, 245 U. S. 627.**

In Southern Pacific Co. v. Schuyler, 227 U. S. 601, it is held (l. c. 610):

"Whether the relation of carrier and passenger arises in the case of one traveling gratuitously in violation of the antipass provision of the Hepburn

> Act, in the absence of any federal statute regulating the matter, is a question not of federal but of state law."

The judgment against the railway was affirmed, this Court (l. c. 610) holding:

> "It is settled by numerous decisions of this Court that where the decision in the state court adverse to the plaintiff in error proceeds upon two independent grounds, one of which not involving a federal question, is suffcient to sustain the judgment, the writ of error will be dismissed or the judgment affirmed."

To like effect is Dibble v. Bellingham Bay Land Co., 163 U. S 63 (l. c. 69), and Central Vermont R. Co. v. White, 238 U. S. 507.

In view of all of which respondent believes that this Court ought not to assume jurisdiction herein.

Nonexistence of Jurisdictional Grounds Claimed by Petitioner.

A. The Missouri Supreme Court, instead of departing from the rulings of this Court, adhered strictly thereto. An examination of the opinion sought to be reviewed here shows that the reasoning throughout was with a clear perception of, and was based on, the present existing law as declared by this Court in Chesapeake & O. R. Co. v.

Proffitt, 241 U. S. 462 (Rec., p. 272); Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310 (Rec., p. 273), both under the Federal Employers' Liability Act.

As to Aerkfetz v. Humphreys, 145 U. S. 418, the opinion holds that the rule there announced (as in other cases cited by appellant) is not applicable because the action here is founded upon the Federal act (Rec., p. 272).

In this connection it may not be inappropriate to recall that the Aerkfetz case (supra) was decided in 1892, fourteen years prior to the enactment of the 1906 Federal act. Its utter inapplicability is, we believe, readily seen from its many points of dissimilarity as compared with the case at bar, as will be pointed out hereafter.

The other cases cited by appellant are not set out in the opinion. The motion to transfer to the court en banc (Rec., p. 280) cites federal cases claimed to have been departed from, but this motion to transfer refers to the modified opinion, and so, of course, was filed subsequently thereto, although the contrary appears from the record (Rec., pp. 265, 279).

B. As to the allegation here that the principles of law applied by the Missouri courts are alien to this jurisdiction, in respect to the duties of interstate carriers in yard operations as well as assumption of risk, we submit that the very converse is apparent from the opinion (as pointed out in the pages immediately preceding), as well as from evidence and authorities which will be referred to in detail by respondent later on in these pages.

As to Pryor v. Williams, 254 U. S. 43 (Williams v. Pryor, 272 Mo. 613), regardless of how far astray the Missouri court went in that case, the facts therein as compared to the case at bar are so utterly dissimilar as to be valueless as a criterion. Nor do we see how the doctrine of last clear chance could apply in the case of an employe falling backward by reason of the giving way of a defective claw bar—as occurred in that case.

Since petitioner's brief devotes considerable space to the Pryor v. Williams case, supra (20, 22, 23), without setting out the facts determinative of the rule announced by this Court, it may not be amiss to supply the omission:

"Pryor v. Williams, 254 U. S. 43.

"Action for personal injuries based on Employers' Liability Act. Negligence is charged against petitioners as respondents of the Wabash R. R. Co.

"Respondent Williams, plaintiff * * * was engaged in tearing down a bridge on the line of the railroad, and a defect in a claw bar which he was directed to use caused the bar to slip while he was attempting to draw a bolt; in consequence, he lost his balance and fell to the ground. * * * The defect, it is alleged, Williams did not know. Negligence, however, was charged against him, and assumption of risk and contributory negligence. He recovered a verdict. * * *

"He was ordered by the foreman in charge of the work to use a claw bar which was defective, in that the claws 'had become so rounded and tooled by long usage that they could not be made to grip the shank

securely, and slipped from their hold when plaintiff pressed downward on the handle, causing him to lose his balance and fall from the cap to the ground.' The plaintiff stated that to discover the defect required an inspection of the under side of the tool, and that in obeying the order of the foreman he did not pause to make such inspection, but used the tool without any but casual inspection of its top surface, which did not reveal the defect.

"The railroad was engaged in interstate commerce, and the cause of action under the case as made fell within the purview of the Federal Employers' Liability Act. * * * The Court (Missouri Supreme) held that Williams' assumption of the risk did not have the consequence assigned to it by the Kansas City Court of Appeals (which reversed the judgment nisi in favor of plaintiff), but, if it existed, amounted in legal effect only to contributory negligence, and that such negligence under the federal statute worked a reduction of damages and not a defeat of the action, and, applying these elements of decision, adjudged that the 'case was well tried by the court nisi and its judgment should be affirmed.' * * * The Court was requested to instruct the jury that the effect of assumption of risk by Williams incident to the use of the claw bar, and the circumstances under which it was used, was to relieve defendants from liability 'for the injury resulting therefrom.' The Court refused the instruction as requested and amended it by adding throughout 'and such fact (the assumption of risk) will be considered by you in determining the amount of plaintiff's recovery, if any, under all of the instructions.'

"The refusal and modification were assigned as error, and the Supreme Court considered and decided, as we have seen, that the fact was of no determining importance, and, if it existed, only constituted contributory negligence and could operate only in reduction of the amount of recovery, not defeat recovery. This was error, as we have seen. Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion."

C. As to assumption of risk by reason of yard construction being a matter of law: As stated in the opinion (Rec., p. 278), plaintiff's instruction predicated his right to recover on the failure to warn, and not on the proximity of the tracks. But, aside from that fact, petitioner, by requesting an instruction on that very subject (which instruction the trial court gave without modification [Rec., p. 276]), accepted the issue. The jury found against it. However, the cases cited on page 17 of petitioner's brief, paragraph V, on this subject we believe fall far short of sustaining the position now taken by petitioner. This we will endeavor to demonstrate in its proper place.

STATEMENT OF THE CASE BY RESPONDENT TO CORRECT INACCURACIES AND OMISSIONS IN PETITIONER'S STATEMENT.

Plaintiff nisi, respondent here (and so designated hereafter), in an action under the Federal Employers' Liability Act, was struck by cars and run over on October 27, 1922 (Rec., p. 266). while checking cars in the employ of the then Receiver for the petitioner, Toledo, St. Louis & Western Railroad Company, in its yards at Madison, Illinois, and seriously injured (Rec., p. 268). There was a verdict and judgment on December 7, 1923 (Rec., p. 1). In petitioner's statement of the case (p. 2) it is recited that in the Missouri Supreme Court there were two opinions, "one in response to a petition for rehearing," although there is nothing in the record to indicate that the later one (Rec., pp. 266, 279) was in response to such petition. However, petitioner has seen fit to set it out (Rec., pp. 256 to 265). It should not be confused with the final one (Rec., pp. 266 to 278), review of which is sought here.

Other matters of pleadings and evidence sufficient for a full understanding of the case appear in the opinion (Rec., pp. 266 to 271).

(Correction of Inaccuracy in Petitioner's Statement, Page 7, Par. 2.)

Respondent contends that the manner in which the cars were handled was **not** the usual and customary method.

Respondent testified that it was customary in that yard to ring the bell when engines are moved (Rec., p. 94); that when he was checking the switchmen passed and told him if they were going to kick cars down where he was working, close to where he was working (Rec., pp. 94, 95). And this was corroborated by respondent's son, an employe in the yard (Rec., pp. 113, 114, 117). There was testimony by the engineer that if he had "seen this man working down there between those tracks, before starting the engine," he would have rung the bell (Rec., p. 215); and again, if he had "seen him there **under the conditions as they were,**" he would have rung the bell (Rec., p. 215). True, he attempts to qualify this last answer by adding the words, "If I knew the man was in the way"; but in the very next breath he admits in no uncertain language that seeing the man was 100 yards ahead and knowing he was going to shunt cars down that way, seeing his lantern, he would not have been able to tell what tracks respondent was between (Rec., p. 215); that **if he had seen a man down there at that distance he would not have known whether he was between the rails or between the tracks, or what track those cars were going down** (Rec., p. 216). Obviously, respondent **was** in danger. The engineer's testimony likewise was that if he sees anyone in danger he rings the bell and blows the whistle (Rec., p. 214).

(Correction of Inaccuracy in Petitioner's Statement, Page 8, Par. 6.)

At the time respondent was struck by the shunted cars he was facing a car on track 5, checking it (Rec., p. 90). He had a little more than half the time usually allowed him to check these trains (Rec., p. 95). He was intent on his work and had no opportunity to keep himself informed as to the movements of the switching crew. He had to get the train out at a certain time (Rec., p. 95).

(Correction of Inaccuracy in Petitioner's Statement, Page 8, Par. 7.)

Murdock's knowledge of respondent's position at the time he shunted the cars past him is amply supported by the record (Rec., pp. 34, 36, 42, 52, 64, 65).

An employe engaged in **checking** cars has such insufficient room between the tracks that to do so without risk he must depend on warning and then flatten himself against the cars being checked (Rec., p. 96).

Respondent checking cars on track 5 was in danger if cars were moved past him without his knowledge, **and Murdock must have known it** from the physical conditions as disclosed by his own testimony, and from his knowledge of the manner in which checkers work (Rec., pp. 37, 38, 40,

43, 56). George Allen, a member of the switching crew, "knew respondent was in a close place" (Rec., p. 118). The engineer testified that if he had seen a man down there at that distance he could not tell whether he was between the rails or between the tracks (Rec., p. 216), and that if he had seen this man working down there between those tracks he would have rung the bell before starting the engine.

(Correction of Inaccuracy in Petitioner's Statement, Page 10, "The Charge.")

Petitioner's **resume** of respondent's instruction No. 2 makes it appear that the jury, upon finding **any one** of the various grounds of negligence, could find in favor of respondent.

As a matter of fact, the several alleged negligent acts and omissions were submitted in the conjunctive, the jury being required to find the existence of each and all of them before convicting the petitioner of negligence (Rec., pp. 241, 244).

As to the refusal to withdraw the charge of negligence as to proximity of tracks, the petitioner, as heretofore pointed out, requested and the Court, without modification, gave instruction No. 5 (Rec., p. 246).

SUMMARY OF ARGUMENT FOR RESPONDENT.

I.

It is negligent to move cars in an unlighted railroad yard without bell or other warning when such movement is likely to subject employe working therein to danger.

Texas and Pacific Railway Co. v. Gentry, 163 U. S. 353;
Frazier v. Interstate Railroad Co., 264 Fed. 96;
Chesapeake & Ohio R. Co. v. Proffitt, 241 U. S. 462;
Norfolk & Western Ry. Co. v. Earnest, 229 U. S. 114;
Davis, Director Gen., v. Hynde, 4 Fed. (2d) 656;
St. L. & S. W. Ry. Co. v. Martin, 266 U. S. 623 (certiorari denied No. 579), 165 Ark. 30.

II.

While employe assumes risks ordinarily incident to the business, he does not assume an unusual risk occasioned by the master's negligence unless he becomes aware of and appreciates it.

Yazoo & M. Valley R. Co. v. Wright, 235 U. S. 376;
Kanawha & M. Ry. Co. v. Kerse, Admr., 239 U. S. 576;
Texas & P. R. Co. v. Harvey, 228 U. S. 319;
Davis v. Crane, 12 Fed. (2nd) 355;
Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64;

Chesapeake & O. R. Co. v. Proffitt, 241 U. S. 462;
Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310;
C. R. I. & P. Ry. Co. v. Lester Brock, 266 U. S. 634 (certiorari denied No. 782), 305 Mo. 502.

III.

Even if custom and rules permit, such movement under such circumstances is negligent.

Norfolk & Western Ry. v. Earnest, 229 U. S. 114;
Texas & Pac. Ry. Co. v. Behymer, 189 U. S. 468;
C. R. I. & P. R. Co. v. Wright, 239 U. S. 548;
Boos v. Minn., St. P. etc. R. Co., 127 Minn. 381;
Chesapeake & O. Ry. Co. v. Proffitt, 241 U. S. 462.

IV.

Instructions given correctly state the law of the case.

Norfolk & Western R. Co. v. Earnest, 229 U. S. 114;
Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551;
City & Suburban Ry. v. Svedborg, 194 U. S. 201;
C. R. I. & P. R. Co. v. Ward, 252 U. S. 18;
Fidelity & Deposit Co. v. Courtney, 186 U. S. 342;
Kanawha & Michigan Ry. Co. v. Kerse, Admr., 239 U. S. 576;
Chesapeake & O. Ry. Co. v. Proffitt, 241 U. S. 462;
Texas & Pac. Ry. Co. v. Behymer, 189 U. S. 468;
C. R. I. & P. R. Co. v. Wright, 239 U. S. 548;
Boos v. Soo Line, 127 Minn. 381.

ARGUMENT FOR RESPONDENT.

The space where Allen was working between tracks 4 and 5 from rail of one track to rail of the other is 7 feet 1½ inches between the gauge lines (Rec., p. 85) and deducting 4 inches for the width of the two rails (Rec., p. 86) reduces the space to 6 feet 9½ inches. All cars, according to Murdock, overhang the rails 18 to 24 inches (Rec., p. 40). But the identical cars complained of (Rec., p. 39), both exactly the same kind of car (Rec., p. 40) and the same type of car as shown (Rec., p. 57) in the last of the five photographs following record page 154, by actual measurement were found to be 10 feet wide (Rec., p. 112).

The width of these tracks (standard gauge) is 4 feet 8 inches (Rec., p. 43). The 5 feet 4 inches difference between the car width and track width necessarily caused an overhang of 2 feet 8 inches. Increasing that by 4¼ inches, the distance the grab iron protrudes, 3 feet and ¼ inch came off the 6 feet 9½ inches, **restricting the working space to 3 feet 9¼ inches**, so that when we figure the standing cars being checked on track five overhang the rail at least 18 inches (Rec., p. 40), the space in which respondent had to work had become a scant 2 feet 3¼ inches.

It was necessary to face the car being checked (Rec., p. 90) and stand back from it about 3 feet, or about 5 feet from the rail (Rec., p. 91), and—the rail to rail space being 7 feet 1½ inches (Rec., p. 85)—within 2 feet 1½

inches of the rail of track 4 (the track on which the cinder cars were shunted past) and with his back to track 4.

To avoid being struck by passing cars on adjoining track, he depended on the engine bell or other warning (Rec., pp. 94, 95) and would flatten himself against the cars he was checking until the others passed (Rec., p. 96). The engineer testified that had he seen respondent he would have rung the bell (Rec., p. 215); that at that distance it was impossible to tell what tracks he was between (Rec., pp. 215, 216) or whether he was between the tracks or between the rails (Rec., p. 216). George Allen said he knew respondent was in a close place (Rec., p. 118). Cars when shunted, as these were, do not make much noise (Rec., p. 44). Respondent's duties required careful attention. He had only about half the usual time to check these cars (Rec., p. 95). The accident occurred about 1:15 o'clock a. m. (Rec., p. 42). There was no light in the yards (Rec., p. 134). It was a starlight night, no moon shining (Rec., p. 134).

Aside from the academic proposition of knowledge by a railroad of conditions in its own yard and its own equipment, Murdock's testimony shows him to have been a car checker himself for about seven years (Rec., p. 36); that he knew the way car checkers work (Rec., p. 37), and the overhang of cars (Rec., p. 40) and yet knowing all these conditions and seeing respondent with a lantern (Rec., pp. 34, 36) he ordered the car movement down track 4 (Rec., p. 32) without warning of any kind (Rec., pp.

44, 46). Whether or not it was customary to give warning is a matter of serious controversy. But even had the custom of no warning been established, to contend that such custom justified the act under the circumstances amounts to just this: "Even though you are in danger and might, if given timely warning, extricate yourself, our custom here is not to warn, and be the result as it may, that custom goes."

I.

It is negligent to move cars in an unlighted railroad yard without bell or other warning when such movement is likely to subject employe working thereon to danger.

In Texas and Pacific Ry. Co. v. Gentry, 163 U. S. 353, this Court affirmed a judgment for plaintiffs, surviving relatives of an engineer, whose death resulted from negligence of railroad in their yards, at night. He was "run down" and killed by a flat car coupled in front of a locomotive used for switching purposes without "headlight, lantern or lights of any kind, or any other signal of danger, or any person to watch for employes on said flat car to give warning of its character, or to sound a whistle or to ring the bell of the locomotive." • • •

The defendant requested a directed verdict on the ground that no negligence was shown.

This Court (l. c. 365) held that these matters were all jury questions.

In Frazier v. Interstate R. Co., 264 Fed. 96, the Circuit Court of Appeals, in reversing judgment sustaining a demurrer in favor of the railroad, said (l. c. 97):

"* * * Aerkfetz v. Humphreys, 145 U. S. 418, is mainly relied on to sustain the demurrer. In that case it was held that negligence could not be inferred from the failure of the defendant to keep a lookout or sound the bell or whistle. * * * It was daylight and there was no obstruction to his view of the slowly approaching train."

* * * * * * *

"The case alleged here is essentially different, some of its features being in striking contrast with these which distinguish the Aerkfetz case."

* * * * * * *

"In the darkness of the night he had to step down from the engine, couple it to a car, step from between the engine and car and communicate by signal with an extra brakeman, who was to couple another car, that the train was ready to pull out. After he had coupled, and while standing near the main track waiting for the exchange of signals, a train, consisting of an engine and a freight car in front and one behind, **came upon him unawares, without warning, and killed him.** The crew of this engine and cars knew the position and work of deceased and his crew, and the danger to which they were exposed, or in the exercise of due care should have known."

* * * * * * *

"Both authority and reason are against the proposition that the crew of a switch train, or any other

> **train, can be judicially declared, as a matter of law, to be without fault in running along** an adjacent track under such conditions as here appear **without showing a light** or sounding a bell or whistle or having a lookout. Upon proof of the allegations of the declaration it will be for the jury to say whether the proximate cause of the casualty was solely negligence of the defendant or of the plaintiff, or the two combined, or inevitable accident. Among the cases sustaining this conclusion are cited: Norfolk & Western Ry. v. Ernest, 229 U. S. 114; Chicago, Rock Island Ry. v. Wright, 239 U. S. 548; Erie R. R. Co. v. Purucker, 244 U. S. 320; Toledo, St. L. & W. R. Co. et al. v. Bartley, 172 Fed. 82; Southern Ry. Co. v. Smith, 205 Fed. 360; Southern Ry. Co. v. Darnell's Adm'x, 114 Va. 312; Hardwick v. Wabash R. Co., 181 Mo. App. 156.
>
> Reversed."

In Chesapeake & Ohio R. Co. v. Proffitt, 241 U. S. 462, in which judgment against the railroad was affirmed, a brakeman was coupling cars in railroad yard, at night. While so engaged the yard crew drove a cut of cars into the standing cars, causing plaintiff to be injured. There was evidence (l. c. 464) that it was customary to take out cars and put others in, and perform such shifting operations at both ends of the train. Whether plaintiff knew of the custom was, under the evidence, open to dispute. This court said (l. c. 468):

> "Negligence in the doing of the work was the gravamen of the plaintiff's complaint, in his declaration as in his evidence, and defendant was not entitled to an-

instruction making the pursuit of a customary system decisive of the issue, without regard to whether due care was exercised in doing the work itself."

Norfolk & Western Ry. Co. v. Ernest, 229 U. S. 114, was an action under the Federal Act for injury in railroad's yards, at night, while walking ahead with a torch, piloting a locomotive through switches to a main track. One of the alleged justifications for negligence urged by the defendant was that the engineer had the right to act on the assumption that plaintiff would take reasonable precaution for his own safety against the approaching engine. It was likewise contended that the usual custom relieved the engineer of the duty to keep a lookout. In this situation the highest court held that all questions were for the jury. The standard of ordinary care was applied. Judgment for plaintiff in the court below was affirmed.

In Davis, Director etc. v. Hynde, 4 Fed. (2nd) 656, l. c. 657:

"It is said that, inasmuch as this case admittedly arises under the Federal Employers' Liability Act (Comp. St., Sec. 8660), the defense of assumption of risk is available (Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492) * * * and the burden of proof is upon plaintiff (N. O. etc. Ry. Co. v. Harris, 247 U. S. 367). * * * However, there was evidence sufficient, if believed, to show that defendant was guilty of gross negligence in running its switch engine with a cut of cars at an excessive rate of speed through

a dense cloud of steam escaping from an engine on the track by the side of the one on which the switch engine was traveling without lights or warning, with full knowledge that the deceased and other employes were working in that particular vicinity. While it is true that deceased may have been guilty of contributory negligence, and the lower court so found as a matter of law, in stepping upon the track which was just a few feet from where he was working, nevertheless, he assumed only the ordinary risks incident to the nature of his employment and of which he had knowledge. He was not bound to anticipate acts of gross negligence, such as some of the evidence in the case indicated (Chesapeake & Ohio R. R. Co. v. De Atley, 241 U. S. 310; Chesapeake & Ohio R. R. Co. v. Proffitt, 241 U. S. 462; Y. & M. V. Ry. Co. v. Wright, 235 U. S. 376; Texas & Pacific Ry. Co. v. Swearingen, 196 U. S. 57; Texas & Pacific Ry. Co. v. Archibald, 170 U. S. 665; C. N. O. & T. P. Ry. Co. v. Thompson, 266 Fed. 149 C. C. A. 211)." * * *

(l. c. 658) The accident occurred on December 24, 1919, at about 6 p. m., which was after dark. * * *

The judgment for plaintiff below was affirmed.

In St. Louis Southwestern Ry. Co. v. Martin, 266 U. S. 623, in which writ of certiorari was denied (No. 579), the facts as reported in 165 Ark. 30, show this to be an action under the Federal Act for death of railroad yard clerk crushed between cars in railroad yards at Pine Bluff.

While crossing one of twelve tracks between the yard office and scales he was passing between the end of a

single car and four others when a kicked car collided with the four cars, catching him in between. It was dark and Martin had a lantern on his arm. The kicked car was rolling down the track at a rapid speed with no one on it to control its movements (l. c. 33, 34). Judgment for Martin, plaintiff nisi, was affirmed by the Arkansas Court, and, as stated above, this Court denied writ of certiorari.

The foregoing are neither isolated or extreme cases; they are but typical of the rule as enumerated time and again by this as well as other courts, federal and state, on the doctrine of actionable negligence in railroad yards.

II.

While employe assumes risks ordinarily incident to the business, he does not assume an unusual risk occasioned by the master's negligence unless he becomes aware of and appreciates it.

The shunting of the cinder cars under the circumstances constituting an unusual and extraordinary risk, respondent did not, as a matter of law, assume it, it being apparent that he was unaware of such car movement.

In Yazoo & M. Valley R. Co. v. Wright, 235 U. S. 376, judgment for death of employe, in action under the Federal Act, was affirmed. Assumption of risk was pleaded, and it was likewise contended by plaintiff in error (railroad) that "plaintiff's case cannot be saved by claiming that it was a matter of contributory negligence and not

assumption of risk, all of which appears in brief of plaintiff in error" (l. c. 377-8). It was the case of an engineer killed when engine being operated by him collided with cars projecting from spur track so near main line as not to allow sufficient clearance. This Court in affirming the judgment below held that there was no assumption of risk in the case, but that it did call for contributory negligence of a fellow servant.

Kanawha & M. Ry. Co. v. Kerse, Admr., 239 U. S. 576, was an action under the federal statute, in which a judgment for the death of a brakeman was affirmed by this Court. Decedent, a brakeman riding the top of a car, came in contact with a timber fastened horizontally across a switch track at a height insufficient to clear him. There was strong testimony to charge decedent with knowledge of the obstruction (l. c. 580). This Court held (l. c. 581):

> "The burden of proof of the assumption of risk was upon defendant, and unless the evidence tending to show it was clear and from unimpeached witnesses, and free from contradiction, the trial court could not be charged with error in refusing to take the question from the jury."

Texas & P. R. Co. v. Harvey, 228 U. S. 319, was an action for death of a hostler's helper, his death resulting from coming in contact with one of a number of posts supporting roundhouse roof while seated in cab window of

locomotive, his hips protruding over the sill. Judgment for his death was affirmed by this Court.

Davis v. Crane, 12 Fed. (2nd) 355, was an action under the Federal Act for death of a brakeman on top of a moving train, in the yards at St. Louis, his head colliding with overhead bridge. The case was twice tried in the District Court, the first trial resulting in a directed verdict for the railway. This judgment was reversed by the Circuit Court of Appeals, and the District Court directed to grant a new trial (291 Fed. 551) on the ground that the negligence of the railway and contributory negligence of decedent were jury questions. The second trial under these directions resulted in a verdict and judgment against railway (l. c. 356), and on this appeal the judgment for plaintiffs was affirmed.

Assumption of risk was pleaded and urged on appeal. The Appellate Court held that to be a jury question, citing in support thereof numerous decisions of this Court and of the United tSates Circuit Court of Appeals (l. c. 356-7).

The opinion (l. c. 358) by Judge Kenyon goes to considerable pains to explain just what does constitute such appreciation of danger as to assumption of risk of defects attributable to the master.

The opinion continues (l. c. 359) in this language:

> "We are asked to say, as a matter of law, that under these circumstances, where the brakeman in

> the line of his duty was on top of a car near the engine of a long moving train, watching for signals from the rear, with his mind necessarily concentrated on that duty, with his back to the bridge the train was approaching, the danger therefrom by reason of insufficient clearance and absence of tell-tale warnings was so obvious that he must be held to have assumed the risk. We cannot so hold."

In Choctaw O. & G. R. Co. v. McDade, 191 U. S. 64, this Court affirmed a judgment for plaintiff's intestate, a brakeman killed from coming in contact with waterspout which cleared the car on which decedent was riding less than a man's height, and (l. c. 68) approved an instruction on assumption of risk to practically the same effect as the instruction in the instant case.

In Chesapeake & O. R. Co. v. Proffitt, 241 U. S. 462, an action under the federal statute, a brakeman, injured coupling cars, recovered substantial damages (l. c. 465). The judgment in the District Court was affirmed by the Circuit Court of Appeals and affirmed by this Court, which stated (l. c. 467):

> "It appears to have been conceded by plaintiff in the Circuit Court of Appeals that the attaching and detaching of cars by working on both ends of the train at the same time was customary at the Gladstone yard, but it does not appear to have been conceded * * * that plaintiff knew of this custom, or had such opportunity for knowledge to be charged with notice of it."

In Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310, the opinion (l. c. 314) states:

> "On the facts of the case before us, therefore, plaintiff having voluntarily entered into an employment that required him, on proper occasions, to board a moving train, he assumed the risk of injury normally incident to that operation, other than such as might arise from the failure of the locomotive engineer to operate the train with due care to maintain a moderate rate of speed in order to enable plaintiff to board it without undue peril to himself. **But plaintiff had the right to presume that the engineer would exercise reasonable care for his safety, and cannot be held to have assumed the risk attributable to the operation of the train at an unusually high and dangerous rate of speed, until made aware of the danger, unless the speed and consequent danger were so obvious that an ordinarily careful person in his situation would have observed the one and appreciated the other.**"

In C. R. I. & P. Ry. Co. v. Lester Brock, 266 U. S. 634, certiorari was denied (No. 782). The opinion on which the railroad based its petition for writ was by the Missouri Court and appears in 305 Mo. 502. Action was under the Federal act, and resulted in a judgment against the railroad, affirmed by the Missouri court of last resort in banc upon remittitur of part of the amount awarded. Plaintiff, nisi, while standing on one of three parallel tracks facing northwest watching and waiting for the

passing of an eastbound freight, was struck by a motor car which approached from his rear, and operated by the railway. The Court refused to give a peremptory instruction to the effect that the railway was under no duty to look out for linemen, including plaintiff, upon its tracks. This instruction was requested on the theory that there was no evidence that plaintiff was actually seen in time to stop the motor car, and that plaintiff knew the conditions and assumed the risk of being struck and injured. It was also contended that plaintiff assumed the risks (known to him) of the use of the bunk car (from which he had alighted) and of the accustomed daily movements of the motor car.

The opinion holds (l. c. 698):

> "The testimony tended to show that the running of the motor car * * * was unusual and not expected, * * * it must be said that he would assume the risks ordinarily incident thereto, and if the place was made unsafe by the negligence of the defendant in a respect of which the plaintiff had full knowledge, and he continued to use them thereafter, he would be held to have assumed the added risk also, but he would not be held to have assumed the added risk, the result of an unusual and unexpected act of negligence on the part of the defendant of which he had no knowledge. This is in accord with what was said in Pope v. Terminal R. R. Ass'n (Mo. Sup.), 254 S. W., l. c. 46, and following Seaboard Air Line v. Horton, 233 U. S. 504; C. & O. v. De Atley, 241 U. S. 310; C. & O. v. Proffitt, 241 U. S. 462; Yazoo & Miss.

R. R. Co. v. Wright, 235 U. S. 376; Erie R. R. Co. v. Purucker, 244 U. S. 320. * * * The Court could not say as a matter of law that plaintiff assumed the risk under the evidence." * * *

Respondent believes the foregoing cases are fairly representative of the rulings of this Court as to assumption of risk, as applicable to the facts in the case at bar, and that a comparison will show perfect harmony between the opinion under review and the rulings of this Court as exemplified above.

III.

Even if custom and rules permit, such movement under such circumstances is negligent.

Norfolk & Western Ry. v. Earnest, 229 U. S. 114. This is an action under the federal act, for injury to a locomotive fireman acting as pilot for a switch engine, in a switch yard in the nighttime. Plaintiff, nisi, had a judgment. On error to the Circuit Court, this Court affirmed the judgment. Defendant relied upon a custom and practice as an excuse for its conduct on the assumption that all responsibility rested upon the plaintiff to take reasonable precaution for his own safety. The Court in this case adopts the doctrine of ordinary care as the controlling standard for the engineer as regards his duty to keep a lookout on the track for plaintiff, who was

in a place where his presence was usual and could reasonably have been anticipated

Plaintiff admitted that as he advanced from the first to the second switch, a distance of 130 feet, he made no attempt to see where the engine was, and "the engineer substantially admitted that in covering that distance he made no attempt to see where the plaintiff was" (l. c. 117). This Court said (l. c. 118):

> "The defendant complains that the Court refused to say to the jury in that connection that the engineer was not required to keep any lookout for plaintiff. We think the refusal was right. As before indicated, there was evidence tending to show that it was usual for the pilot to walk between the rails in advance of the locomotive, that the conditions outside the track made it necessary to do so in the nighttime, and that all this was known to the engineer. Whether this evidence was true was for the jury to determine, and if it was true it certainly could not be said as a matter of law that the engineer was in the exercise of ordinary care, which was the controlling standard for him * * *."

In Texas and Pac. Ry. Co. v. Behymer, 189 U. S. 468, the defendant relied upon the ordinary method of handling a train as a basis for a finding that it was not negligent, apropos of which this Court (l. c. 470) said:

> "The fundamental error alleged in the exceptions to the charge is that the Court declined to rule that

the chance of such an accident as happened was one of the risks that the plaintiff assumed, or that the question whether the defendant was liable for it depended on whether the freight train was handled in the usual and **ordinary way.** Instead of that, the Court left it to the jury to say whether the train was handled with ordinary care; that is, the care that a person of ordinary prudence would use under the same circumstances. This exception needs no discussion. The charge embodied one of the commonplaces of the law. **What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not"** (Wabash R. Co. v. McDaniels, 107 U. S. 454).

In C. R. I. & P. R. Co. v. Wright, 239 U. S. 548, the defendant relied upon its rules permitting a switching crew to run their engine through its yards with right of way over certain other trains. It collided with another such train. The highest court affirmed a finding of negligence and sustained the contention of the plaintiff in the court below to the effect that if the rules of the defendant permitted the doing of a thing that was negligent, to that extent the rules could be found unreasonable.

In Boos v. Minn., St. P. etc. R. Co., 127 Minn. 381, the Minnesota Court, on the same subject, has this to say:

"Nor could defendant toll its duty to use reasonable care in keeping safe the place where deceased was required to work, by invoking a custom or usage

of handling its cars in such an inherently dangerous manner as that disclosed by this record. As said in Hamilton v. Chicago, B. & Q. Ry. Co., 145 Iowa 431, 436, 124 N. W. 363, 365: **'It is practically the universal rule that custom or usage will not satisfy a negligent act.'** To the same effect see Braaflat v. Minneapolis & Northern Ele. Co., 90 Minn. 367, 369, 96 N. W. 920; Witia v. Interstate Iron Co., 103 Minn. 303, 309, 115 N. W. 169, 16 L. R. A. (n. s.) 128; The P. P. Miller, 180 Fed. 288; Thompson, Negligence, Par. 30, 3777; White's Supp. Id. (Vol. VIII), same sections. And, as declared by Mr. Thompson in his Commentaries on Negligence, Par. 4528, note: 'It would be difficult to state a proposition more careless of justice and absolutely brutal, than the proposition that a railroad company can shunt its cars along its tracks at night with no light upon them to apprise its yardmen of their approach, and with no man upon them to give warning to those who may be on the track in front of them.' See sections 4512-4543, Vol. VIII (White's Supp.) of the same work. See, also, Bordeaux v. Atlantic, 150 N. C. 528, 64 S. E. 439. Defendant could not have contracted for immunity from liability for negligence, and so much the more can it not be permitted to stand behind a negligent custom. Nor would an employe readily be charged with assuming the risks involved in such a custom, and the evidence in this case falls short of establishing any such assumption as a matter of law."

It is to be observed that the conclusions of the Minnesota Court are fortified by abundant and respectable authorities.

Again, referring to the case of Chesapeake & O. Ry. Co. v. Proffitt, 241 U. S. 462. It was claimed that the work of switching at both ends of a manifest train was in accordance with a general custom and practice known to plaintiff. As to that proposition this Court said:

> "In the absence of such knowledge or notice, the custom could not be made binding upon plaintiff; certainly not without a finding that it was one that a reasonably careful employer would have adopted."

IV.

A. Instructions given correctly state the law of the case.

B. If there was error in respondent's instruction, it was not prejudicial to petitioner in view of testimony of switch foreman that he saw and knew of respondent's presence when he directed the negligent act complained of.

C. There was no error in refusal of petitioner's requested instruction "K" on custom in its yards as to warning, said instruction not properly declaring the law.

The instruction (No. 2) asked and given at the instance of plaintiff (Rec., pp. 241-2-3-4) amounted in substance to this:

It required the jury to find a combination of elements, including physical surroundings and method of work, which would tend to show that respondent's position was one of peril. If they found all these things and that by reason thereof the respondent **was** in a position of peril

and oblivious thereof; and if they further found that the men in charge of the cinder car movement knew all these things and could have warned respondent in time for him to have extricated himself, but failed to do so and respondent was injured by reason of such failure to warn, then and only then could they find a verdict in his favor, always providing that he was in the exercise of ordinary care and was not injured as the result of any risks assumed. It is true, as petitioner contends, instead of requiring the men responsible for the car movement to actually see respondent—that part of the instruction had appended the words "or by the exercise of ordinary care could have seen him." But inasmuch as there is no controversy about the fact that Murdock actually did see respondent, and so testified repeatedly (Rec., pp. 34, 36) the error, if error there was, could not have been prejudicial to petitioner. The opinion of the Missouri Supreme Court (Rec., p. 277) states: "The evidence shows, without any controversy, that Murdock, the switch foreman, saw and knew of the plaintiff's perilous position. * * *"

Apparently petitioner takes no exception to the phraseology of the instruction given at the instance of respondent on assumption of risk, but contends that the Court should not have let the jury pass on this matter and should have held the respondent to have assumed the risk as a matter of law. We do not agree to this, nor do we believe that under the applicable rulings of this Court there is any precedent therefor. However, the peti-

tioner, at the trial nisi, asked and the Court gave without modification an instruction on assumption of risk (Rec., p. 246), and thus waived whatever, if any, merit there was in their contention.

A.

In Norfolk & Western R. Co. v. Earnest, 229 U. S. 114, under somewhat similar circumstances this Court (l. c. 118) approved the following instruction:

> "If the jury believe from the evidence that it was necessary or usual within the knowledge of John Drawbond (the engineer) for plaintiff to walk on, along or over the tracks of the defendant company in front of the said engine while it was moving, in order to properly perform his duties of piloting said engine out of said yard, it was then the duty of the defendant company * * * to use reasonable care and caution in the management of said engine and to keep such a lookout for the plaintiff as an ordinarily prudent and careful man would have done under the circumstances, to avoid running said engine upon or over the plaintiff; and if the engineer did not exercise such reasonable care and caution and that his failure so to do was the proximate cause of the accident, then they must find for the plaintiff."

Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, is a case where a wharf owner recovered judgment for injuries caused by defendant operators of a steamboat,

for negligent handling, crushing plaintiff's foot between the boat and wharf. This Court in affirming the judgment nisi approved, among others, an instruction (l. c. 558):

> "* * * the contributory negligence on his (plaintiff's) part would not exonerate the defendant and disentitled the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence."

In substance, this instruction is the same as the last-clear-chance instruction in the case at bar.

B.

City & Suburban Ry. v. Svedborg, 194 U. S. 201: Error was assigned in an instruction that told the jury they could find for plaintiff if the starting of the car from which she was alighting was due to the negligence of the motorman or conductor, or both, when it was claimed that there was not the slightest proof of negligence on the part of the conductor. This Court said (l. c. 203):

> "We need not review the evidence as to the conductor; for if, as the defendant insists, there was no evidence whatever showing negligence on the part of the conductor, then the modification made by the Court (adding the words 'or conductor, or both') could not have misled the jury as to prejudice the defendant."

To like effect are C. R. I. & P. R. Co. v. Ward, 252 U. S. 18, and Fidelity & Deposit Co. v. Courtney, 186 U. S. 342, l. c. 351.

In Kanawha & Michigan Ry. Co. v. Kerse, Admr., 239 U. S. 576, this Court said (l. c. 582):

> "* * * The refusal of this request appears plainly erroneous. But this does not result in a reversal of the judgment * * * because, by specific findings of fact, the jury negatived the hypothesis upon which alone the instruction was based. * * * A judgment is not to be reversed for an error by which the plaintiff in error cannot have been prejudiced. * * *"

C.

In Chesapeake & O. Ry. Co. v. Proffitt, 241 U. S. 462, it was held (l. c. 468) that

> "defendant was not entitled to an instruction making the pursuit of a customary system decisive of the issue, without regard to whether due care was exercised in doing the work itself. Even if plaintiff knew and assumed the risks of an inherently dangerous method of doing the work, he did not assume the increased risk attributable, not to the method, but to negligence in pursuing it. * * *"

Petitioner's instruction K on assumption by respondent of risk of custom not to warn is equally as vulnerable as the one referred to above.

Similar rulings are contained in Texas & Pac. Ry. Co. v. Behymer, C. R. I. & P. R. Co. v. Wright, and Boas v. Soo Line, supra, under respondent's third assignment.

CASES CITED BY PETITIONER—THEIR INAPPLICABILITY.

The only cases cited by petitioner touching the merits of the case appear in its "Specifications of Error" and "Brief" (pages 13 to 18, inclusive).

These cases are here set out in the order under the same headings as in petitioner's brief. The numbering in the left margin will identify them with corresponding numbers in the pages immediately following, and in which we endeavor to show their dissimilarity to the instant case and wherein they do not apply.

V.

The plaintiff assumes whatever risks were involved in the manner in which the yards were constructed and the usual train movements therein.

(1) Boldt v. Pennsylvania R. R. Co., 245 U. S. 445;
(2) Chesapeake etc. Ry. Co. v. Nixon, 271 U. S. 219;
(3) Tuttle v. Milwaukee Rwy., 122 U. S. 189;
(4) Randall v. Baltimore etc. Railway Co., 109 U. S. 478;
(5) Connelley v. Pennsylvania R. Co., 201 Fed. 54, approved in Railway Co. v. Nixon, 271 U. S. 219.

VI.

In switching operations the lack of signals is not negligence.

(6) Aerkfetz v. Humphreys, 145 U. S. 420;
(2) Chesapeake etc. Ry. Co. v. Nixon, 271 U. S. 219;
(7) Reading Co. v. Haldeman, 20 F. (2d) 53 (C. C. A. 3rd).

VII.

Those in charge of the train movement could not be required to take special efforts to avoid injury to the plaintiff unless his peril was known to them.

(8) St. Louis etc. Ry. Co. v. Shumacher, 152 U. S. 77;
(9) Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551;
(6) Aerkfetz v. Humphreys, 145 U. S. 420.

VIII.

An experienced railroad employe who is familiar with the custom of switching cars without providing them with a lookout or lights assumes the risk of injury resulting from such custom and is precluded from recovering for injuries suffered by reason thereof under the Federal Employers' Liability Act.

(10) Southern Pacific Co. v. Berkshire, 254 U. S. 415;

(11) Seaboard Air Line Ry. v. Horton, 233 U. S. 492;
(12) Jacobs v. Southern R. R., 241 U. S. 229;
(13) Gilmer v. Yazoo & M. V. R. Co., 4 Fed. (2nd) 963 (certiorari denied, 268 U. S. 639) (705).

(1) Boldt v. Pennsylvania R. R. Co., 245 U. S. 443, involved negligence in respect to a car kicked in a railroad yard against standing cars while plaintiff, an experienced yard conductor, was between, contrary to instructions, attempting to adjust a faulty coupler. The case was tried to a jury. An instruction on assumption of risk was given. The jury found for the defendant railroad.

As the opinion in this court recites, "a rule forbade employes from going between the cars without taking precautions" not observed in the present case. The place of the injury was, according to the definition in the instruction, "a live track, a dangerous place to work." As he was between the cars and could not have been seen by the men who "kicked" the cars, neither "failure to warn" or the doctrine of last-clear chance were in the case.

As to assumption of risk of either yard construction or the usual train movements, the former element was nowhere in the case, and the latter was left to the jury.

(2) Chesapeake etc. Ry. Co. v. Nixon, 271 U. S. 219. This was a **daylight case.** The deceased was an experienced section foreman, riding on a track velocipede when overtaken by a train and killed. There was nothing

unusual about the train movement. The doctrine of last clear chance was not in the case; in fact, neither the engineer nor fireman was shown to have seen Nixon before the train struck him.

(3) Tuttle v. Milwaukee Ry., 122 U. S. 189, was decided in 1887, and, of course, was not under the Federal Act. This Court said (l. c. 194):

> "We do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, much less that it should be left to the varying and uncertain opinions of juries to determine such an engineering question."

However, the Federal Act holds the railroad accountable for defects or insufficiencies in track or roadbed; and we are not sure but what the rule just announced has thus been abrogated.

Be that as it may, while the reason for the rule is quite apparent as to "curves," it can have no application to track spacing.

In the "construction of the tracks the engineer, of course, has to take into account the degree of curve with relation to the flange of the wheel; the sharper the curve the greater danger of the wheels of the equipment leaving the rails. The engineering problem then is to accurately combine three elements in their nearest possible propor-

tions, namely, degree of curve, economy of space and safety to employes and equipment.

Spacing of tracks requires nothing of the sort. The sole basis upon which rests their relativity is economy of space; the more the economy the greater the danger. Spacing of tracks is like the clearance of a waterspout, which Mr. Justice Day in Choctaw, O. etc. R. Co. v. McDade (191 U. S. 64, l. c. 67), said was "so free of any consideration of skill except that of the foot rule, and so entirely destitute of any element of choice or selection that not to make such a construction safe * * * is a conviction of negligence."

(4) Randall v. Baltimore & Ohio Ry. Co., 109 U. S. 478: In this case a brakeman was struck by a train while working a switch. It was decided in 1883, and so, of course, was not under the Federal statute. But as regards the switch, this Court said (l. c. 482) that it was

> "of a form in common use. * * * It could have been safely and efficiently worked by standing opposite the lock, midway between the tracks, using reasonable care, and it was unnecessary in order to work it to stand as the plaintiff did, at the end of the handle, next the adjacent track."

There was no showing that the enginemen saw plaintiff before he was struck, and, consequently, neither the question of warning nor last clear chance was in the case; nor does the choice of a place to work, as appears in the above case, apply to the case at bar.

(5) Connelley v. Pennsylvania R. Co., 201 Fed. 54. This was not under the federal act. Plaintiff, as administratrix, sued for death of husband, a trackwalker killed while engaged in tightening a bolt on rails of one of a network of tracks between two stations in the City of Philadelphia, over which "there is the constant passage of several hundred trains incident to such a station." He was working in a cloud of escaping steam and smoke from a standing engine alongside.

Trackwalkers, including deceased, were required to go in pairs "so that they can better look out for each other's safety," one supposed to watch while the other worked (l. c. 56). His companion called the attention of Connelley to the enveloping steam, and advised their moving aside (l. c. 57), and, as the Circuit Court of Appeals, in reversing the judgment below said (l. c. 57):

> "The failure of decedent to heed this timely warning and step aside undoubtedly cost him his life. The railroad had taken the additional step of placing a brakeman on the switching train. He was on watch and had the emergency brake ready, but the steam which enveloped Rowan and Connelley until they were struck, made it just as impossible for the brakeman to see them as it was for them to see the approaching train."

(6) Aerkfetz v. Humphreys, 145 U. S. 420, was decided in 1892, and so, of course, was not under the federal act,

which was intended to be remedial and to be liberally construed in favor of the employe. There was a directed verdict, but on the ground of contributory negligence (l. c. 419), not a defense under the federal act. Plaintiff was a track repairer. As the opinion recites (l. c. 420) that "for a quarter of a mile east of him there was no obstruction and by ordinary attention he could have observed the cars," we may assume that it was a daylight accident.

Petitioner apparently gains much comfort from the Aerkfetz case, supra; but even were there any similarity between the facts in that case and the instant case, the Aerkfetz case, as we read it, does not lay down a hard and fast rule for yard operations under all conditions.

The following cases distinguish the conditions therein contained:

T. & P. Ry. Co. v. Gentry, 163 U. S. 353 (l. c. 366), decided by this Court May 18, 1896, a yard movement at night, the negligence alleged and evidence adduced being almost identical to that in the instant case (l. c. 356).

Frazier v. Interstate R. R. Co., 264 Fed. 96, a yard movement at night (l. c. 97), in which the Aerkfetz case, supra, was mainly relied on by the defendant railroad to sustain a demurrer, and in which the Circuit Court of Appeals, Fourth Circuit, calls attention to the Aerkfetz case as a daylight accident (l. c. 97).

Central R. R. Co. of N. J. v. Sharkey, 259 Fed. 144 (l. c. 149), a yard movement (l. c. 145), and in which assumption of risk was held to be a jury question (l. c. 150).

(7) Reading Co. v. Haldeman, 20 F. (2d) 53 (C. C. A. 3rd), was not under the federal act. It was a daylight case. Plaintiff was walking between two tracks. The engine which struck him could be seen for 400 or 500 feet and plaintiff suddenly stepped right in front of it (l. c. 54). The last-clear-chance element was not present here.

(8) St. Louis etc. Ry. Co. v. Shumacher, 152 U. S. 77, was not under the federal act. Plaintiff, sitting on the end of a stationary flat car with his feet hanging over the side, was jolted off by the impact of cars which were coupled with unusual violence. He testified he knew they were about to couple cars, but was not watching and did not see the other cars come down. This Court held, in reversing the judgment of the Circuit Court (l. c. 81), that there was no negligence by defendant. The last-clear-chance element was not in the case.

(9) Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, as heretofore set out, is where a wharf owner recovered judgment for injuries caused by the negligent handling of a steamboat by the defendant. An instruction on last clear chance, which was given, was approved by this Court (l. c. 558) in affirming the judgment, nisi.

(10) Southern Pacific Co. v. Berkshire, 254 U. S. 415, involves the risk assumed by an engineer who, while lean-

ing from his cab, came in contact with a mail crane. That this Court did not extend the doctrine to include obstructions in general is evidenced by the language used (l. c. 416):

> "The Post Office Department fixes the distance of these cranes. The end of the crane, when elevated, was not nearer to the train than fourteen inches, but might have been found to be as near as that, and therefore near enough to be capable of hitting a person leaning out of the window, as indeed was shown by the event";

and continuing, at l. c. 418:

> "In short, it would be impossible to use the contrivance with absolute certainty that no accident would happen if a man put his head out at the wrong moment. It equally is impossible to condemn railroads as wrongdoers simply for adopting the device with the conditions imposed by the Post Office Department * * * but further, Linder perfectly well knew of the existence of the crane where it stood, and could have seen it from his seat had he looked, long before he reached it."

(Distinguished in Davis v. Crane, 12 Fed. (2d) 355, l. c. 359, in which the reviewing court says: "Defendant places stress upon Sou. Pac. v. Berkshire. * * * The doctrine in that case is limited by the Court to mail cranes. * * *")

(11) Seaboard Air Line v. Horton, 233 U. S. 492: Plaintiff was an experienced engineer and had reported the day before that his engine required a "guard glass" for the gauge on his engine, but he could not get a proper one and was instructed to run his engine without one. The glass exploded while he was operating the engine and fragments struck him in the face, and this was the basis of the suit. It was held (l. c. 501) that he assumed the risk.

(12) Jacobs v. Southern Ry. Co., 241 U. S. 229, holds that an experienced employe of a railroad, who knew of a pile of cinders, and who attempted to board a moving train with a bucket of water in his hand and claimed to have been tripped by the pile of cinders, assumed the risk. Assumption of risk, however, was for the jury.

The last three cases are cited by petitioner in support of its assignment VIII, that "an experienced railroad employe who is familiar with the custom of switching cars without providing them with a lookout or lights assumes the risk of injury resulting from such custom and is precluded from recovering for injuries suffered by reason thereof under the Federal Employers' Liability Act." Plainly they are not in point.

(13) Gilmer v. Yazoo & V. R. Co., 4 F. (2d) 963, was under the federal act. There was judgment for defendant railroad below, which was affirmed by the Court of Appeals, Fifth Circuit, which it reached on error. Certiorari to that court was denied here (268 U. S. 705).

However, there is no similarity between the facts in that case and the case at bar.

The Gilmer case was an action for death of flagman, due to negligence in switching cars in a railroad yard and in failing to properly light the yard (l. c. 963). Whether the failure to have a lookout or light on the car which struck Gilmer constituted negligence was not passed on by the Appellate Court, as witness the language of the opinion (l. c. 964):

> "In the view we take of the case it is unnecessary to consider either whether the switching operations conducted in defendant's yards were carried on in such a way as to constitute negligence on the part of the railroad company, or whether plaintiff's intestate was guilty of such negligence as to bar recovery. Assuming in favor of plaintiff that defendant was negligent, and that her husband was not, we are of opinion that the doctrine of assumption of risk is fatal to a recovery in this case."

But, as to assumption of risk, the facts are vastly different from the facts in the case at bar.

First and foremost, from the **uncontradicted testimony**, Gilmer, just before sunrise, when it was light enough to see a freight car at least 200 feet (l. c. 964), stopped immediately in the path of the car which was traveling about fifteen miles per hour. Freight trains were made up and broken in this yard continuously, about 2,000 cars being switched daily. Gilmer was not restricted in his

movements, or performing any work for the company which required him to look in a direction other than up and down the rails.

And, furthermore, the Court said (l. c. 964) that Gilmer was "bound to know from his experience that the precautions against injury now insisted upon did not prevail in defendant's yard, and that it might be expected at any time, day or night, that a car would be moved **without warning of any kind.**"

CONCLUSION.

The petitioner, to secure its writ herein, represented to this Court that the court below had permitted a jury to decide whether the tracks were negligently constructed as to the space between, a representation not warranted by the record. Petitioner also represented to this Court that the trial court announced a more liberal rule on the subject of last clear chance than the rule in the Federal courts permits. These two matters, as well as assumption of risk, were stressed as a basis for the issuance of the writ. Assumption of risk, petitioner claimed, was a question of law for the Court. The petition also represented that the facts in this case are similar to those in Aerkfetz v. Humphreys (supra); whereas, they are dissimilar in every respect, both as to physical conditions and basis of recovery.

We think this Court, as did the Missouri court, will hold that the instructions, so far as relating to track condi-

tions, were not intended and could not be understood as a basis for finding original negligence. We think, further, that the last-clear-chance instruction, if erroneous, was not prejudicial, in view of the actual evidence of knowledge.

On the main issue, assumption of risk, we do not believe this Court will ever hold that question one of law under such facts as exist here. It is doubtful if a writ would have been granted on that issue alone. In St. L. S. W. Ry. v. Martin, supra, more favorable to defendant than the instant case on assumption of risk, the writ was denied (266 U. S. 623, No. 579).

As to original negligence, respondent's position—which we believe to be invulnerable—is that it is one thing to see or know an employe is ahead on a track in broad daylight, then shunt a car in his direction in the belief that he will protect himself and is therefore in need of no warning, but that it is entirely different to do the same thing at night, when the employe ahead cannot see the start of the shunted car or see the car come forward. It is no justification under the latter conditions to say that he may be out of danger one moment and in danger the next. The railroad must govern its conduct by conditions as they are known to exist or might reasonably be expected to be encountered and by the usual way the employe exercising due care will react under those conditions. It is no excuse to claim that these requirements would place an undue burden upon railroad operation.

The instant case is essentially different from daytime cases, and essentially different from cases involving employes injured between causal or accidental openings between cars in yards. The exigencies of modern yard operations are not such that cars may be shunted at night without warning and with a total disregard for the safety of employes lawfully about the yards in the discharge of their duties and who, if required to be continually alert to safeguard life and limb, would be seriously hampered in the efficient performance of their duties.

To fasten assumption of risk upon respondent the negligent course of conduct by the railroad must be so constant, so usual and unvarying, and any other course of conduct so unusual, that respondent under all circumstances could have and should have expected unlighted cars in the darkness to move silently down and, unless he were continually on the watch for them, catch him unawares.

Negligence in a particular operation, to be assumed, must contemplate a then present knowledge and appreciation of danger.

That there was negligence in the operation here, we believe the record and the applicable law as announced by this Court has amply demonstrated. We do not believe that under the evidence here it can be seriously contended that respondent had, or could be charged with, knowledge or appreciation of the danger attendant thereon.

Finally, it is respectfully but insistently urged that, instead of **not** following the rulings of this Court, on the contrary, what the Missouri Supreme Court did do was to point out the peculiar facts in petitioner's cited cases and show clearly and convincingly why those peculiar facts rendered those cases inapplicable, and then proceed to patiently look up controlling cases by this Court in which the facts correspond as nearly as possible with the facts in the instant case. Those cases established a well-defined course, and that course the Missouri Supreme Court, "in spite of false lights on the shore," unerringly and unswervingly followed.

For reasons herein urged respondent believes that this Court ought not to assume jurisdiction; but if jurisdiction is assumed, an examination of the record and the opinion of the Missouri Supreme Court affirming the judgment below will clearly and conclusively show that such opinion is not only fully warranted by the law and facts, but is in perfect accord with applicable and controlling decisions of this Court, and should be affirmed.

Respectfully submitted,

HOLLAND R. POLAK,
JAMES J. O'DONOHOE,
Counsel for Respondent.